No. 17-204

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,
Petitioner,
v.
ROBERT PEPPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 2, 2017
CERTIORARI GRANTED JUNE 18, 2018

TABLE OF CONTENTS

Page

United States Court of Appeals for the Ninth Circuit Relevant Docket Entries: *In re: Apple iPhone Antitrust Litig.; Pepper v. Apple Inc.*, No. 14-15000 ..... JA-1

United States District Court for the Northern District of California Relevant Docket Entries: *In re: Apple iPhone Antitrust Litig.; Pepper v. Apple Inc.*, 4:11-cv-06714-YGR JA-10

Amended Consolidated Class Action Complaint, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (N.D. Cal. filed Sept. 28, 2012), ECF No. 81 ..... JA-34

Defendant Apple's Notice of Motion and Motion to Dismiss Plaintiffs' Amended Consolidated Class Action Complaint, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (N.D. Cal. filed Nov. 2, 2012), ECF No. 88 (excerpts) JA-66

Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Apple's Motion to Dismiss the Amended Consolidated Complaint, *In re Apple & AT&TM Antitrust Litig.*, No. 11-cv-06714-YGR (N.D. Cal. filed Dec. 7, 2012), ECF No. 99 (excerpts) JA-71

TABLE OF CONTENTS—Continued

Page

Reply in Support of Defendant Apple's Motion to Dismiss Plaintiffs' Amended Consolidated Complaint, *In re Apple iPhone Antitrust Litig.*, No. C 11-cv-06714-YGR (N.D. Cal. filed Dec. 21, 2012), ECF No. 103 (excerpts)..... JA-74

United States District Court for the Northern District of California Transcript of Proceedings held Mar. 5, 2013, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (N.D. Cal. Apr. 3, 2013), ECF No. 107 (excerpts)..... JA-78

Order of the United States District Court for the Northern District of California Granting Apple's Motion to Dismiss Amended Consolidated Complaint, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR, 2013 WL 6253147 (N.D. Cal. Aug. 15, 2013), ECF No. 108..... JA-84

Defendant Apple's Notice of Motion and Motion to Dismiss Plaintiffs' Second Amended Complaint; Memorandum of Points and Authorities in Support, *In re Apple iPhone Antitrust Litig.*, No. C 11-cv-06714-YGR (N.D. Cal. filed Sept. 30, 2013), ECF No. 115 (excerpts)..... JA-121

TABLE OF CONTENTS—Continued

Page

Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant Apple's Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint, *In re Apple iPhone Antitrust Litig.*, No. C 11-cv-06714-YGR (N.D. Cal. filed Oct. 15, 2013), ECF No. 116 (excerpts) JA-127

Defendant Apple's Reply in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint, *In re Apple iPhone Antitrust Litig.*, No. C 11-cv-06714-YGR (N.D. Cal. filed Oct. 22, 2013), ECF No. 118 (excerpts) JA-132

United States District Court for the Northern District of California Transcript of Proceedings held Nov. 5, 2013, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (N.D. Cal. Nov. 25, 2013), ECF No. 123 (excerpts) JA-137

ITEMS PREVIOUSLY REPRODUCED

In accordance with Supreme Court Rule 26.1, the following items have been omitted in printing this joint appendix because they appear on the following pages of the appendix to the Petition for a Writ of Certiorari (Aug. 2, 2017)

TABLE OF CONTENTS—Continued

Page

Opinion of the United States Court of Appeals for the Ninth Circuit, *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litig.)*, 846 F.3d 313 (9th Cir. 2017) 1a

Order of the United States District Court for the Northern District of California Granting Apple's Motion to Dismiss Second Amended Complaint with Prejudice, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR, 2013 WL 6253147 (N.D. Cal. Dec. 2, 2013) 23a

Order of the United States Court of Appeals for the Ninth Circuit denying petition for rehearing and rehearing *en banc*, *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litig.)*, No. 14-15000 (9th Cir. May 4, 2017)..... 38a

Second Amended Complaint, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714-YGR (N.D. Cal. filed Sept. 5, 2013)..... 40a

RELEVANT DOCKET ENTRIES

U.S. Court of Appeals for the Ninth Circuit
Case No. 14-15000

Date Filed	#	Docket Text
01/02/2014	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 01/09/2014. Transcript ordered by 01/30/2014. Transcript due 03/03/2014. Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell opening brief due 04/10/2014. Appellee Apple, Inc. answering brief due 05/12/2014. Appellant's optional reply brief is due 14 days after service of the answering brief. [8921930] (RT) [Entered: 01/02/2014 09:24 AM]
		* * *
05/12/2014	7	Submitted (ECF) Opening Brief and excerpts of record for review. Submitted by Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell. Date of service: 05/12/2014. [9092295] (Rickert, Rachele) [Entered: 05/12/2014

05:16 PM]

05/13/2014	8	Filed clerk order: The opening brief [7] submitted by Edward W. Hayter, Robert Pepper and Stephen H. Schwartz is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: blue. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the excerpts of record [7] submitted by Edward W. Hayter, Robert Pepper and Stephen H. Schwartz. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9093179] (WWP) [Entered: 05/13/2014 11:43 AM]
05/16/2014	9	Filed Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell paper copies of excerpts of record

		[7] in 2 volume(s). [9098732] (WWP) [Entered: 05/16/2014 11:21 AM]
05/16/2014	10	Received 7 paper copies of Opening brief [7] filed by Edward W. Hayter, et al. [9099246] (SD) [Entered: 05/16/2014 02:13 PM]
		* * *
07/11/2014	15	Submitted (ECF) Answering Brief and supplemental excerpts of record for review. Submitted by Appellee Apple, Inc.. Date of service: 07/11/2014. [9166529] (Wall, Daniel) [Entered: 07/11/2014 04:41 PM]
7/11/2014	16	Filed (ECF) Appellee Apple, Inc. Motion to take judicial notice of. Date of service: 07/11/2014. [9166553] (Wall, Daniel) [Entered: 07/11/2014 04:47 PM]
07/14/2014	17	Filed clerk order: The answering brief [15] submitted by Apple, Inc. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: red. The paper copies shall be printed from the PDF version

		of the brief created from the word processing application, not from PACER or Appellate ECF. The Court has reviewed the supplemental excerpts of record [15] submitted by Apple, Inc.. Within 7 days of this order, filer is ordered to file 4 copies of the excerpts in paper format, with a white cover. The paper copies must be in the format described in 9th Circuit Rule 30-1.6. [9167135] (WWP) [Entered: 07/14/2014 10:38 AM]
07/14/2014	18	Received 7 paper copies of Answering brief [15] filed by Apple, Inc.. [9168197] (SD) [Entered: 07/14/2014 03:44 PM]
07/14/2014	19	Filed Appellee Apple, Inc. paper copies of excerpts of record [15] in 1 volume. [9168688] (WWP) [Entered: 07/15/2014 07:12 AM]
		* * *
08/25/2014	22	Submitted (ECF) Reply Brief for review. Submitted by Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell. Date of service: 08/25/2014. [9218285] (Rickert, Rachele) [Entered: 08/25/2014 04:43 PM]

08/25/2014	23	Filed (ECF) Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell response opposing motion (,motion to take judicial notice). Date of service: 08/25/2014. [9218303] (Rickert, Rachele) [Entered: 08/25/2014 04:47 PM]
08/28/2014	24	Filed clerk order: The reply brief [22] submitted by Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be printed from the PDF version of the brief created from the word processing application, not from PACER or Appellate ECF. [9222326] (WWP) [Entered: 08/28/2014 10:37 AM]
09/02/2014	25	Received 7 paper copies of Reply brief [22] filed by Edward W. Hayter,et al. [9225407] (SD) [Entered: 09/02/2014 11:10 AM]
09/02/2014	26	Filed (ECF) Appellee Apple, Inc. reply to response (,motion to take

		judicial notice,). Date of service: 09/02/2014. [9226064] (Wall, Daniel) [Entered: 09/02/2014 04:02 PM]
		* * *
02/10/2016	31	ARGUED AND SUBMITTED TO A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN. [9861584] (TLH) [Entered: 02/10/2016 02:54 PM]
01/12/2017	32	Filed order (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN) Appellee Apple, Inc.'s motion to take judicial notice dated July 11, 2014, is DENIED. [10263236] (PH) [Entered: 01/12/2017 09:08 AM]
01/12/2017	33	FILED OPINION (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN) REVERSED AND REMANDED. Judge: AWT , Judge: WAF Authoring, Judge: RWG . FILED AND ENTERED JUDGMENT. [10263240] (PH) [Entered: 01/12/2017 09:12 AM]
		* * *
01/26/2017	35	Filed (ECF) Appellee Apple Inc. petition for panel rehearing and petition for rehearing en banc

(from 01/12/2017 opinion). Date of service: 01/26/2017. [10282274] [14-15000] (Wall, Daniel) [Entered: 01/26/2017 06:24 PM]

02/07/2017 36 Filed order (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN): Plaintiffs-Appellants are directed to file a response to Apple's Petition for Rehearing and Rehearing En Banc filed with this court on January 26, 2017. The response shall not exceed fifteen pages or 4200 words, and shall be filed within 21 days of the date of this order. [10304859] (AF) [Entered: 02/07/2017 08:25 AM]

* * *

02/28/2017 38 Filed (ECF) Appellants Edward W. Hayter, Robert Pepper, Stephen H. Schwartz and Eric Terrell response to Combo PFR Panel and En Banc (ECF Filing) , Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing. Date of service: 02/28/2017. [10336910].--[COURT ENTERED FILING to correct entry [37].] (SLM) [Entered: 02/28/2017 03:07 PM]

05/04/2017	39	Filed order (A. WALLACE TASHIMA, WILLIAM A. FLETCHER and ROBERT W. GETTLEMAN): The panel has voted unanimously to deny the petition for rehearing. Judge Fletcher has voted to deny the petition for rehearing en banc, and Judges Tashima and Gettleman so recommend. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc, filed January 26, 2017, are DENIED. [10421696] (AF) [Entered: 05/04/2017 09:59 AM]
		* * *
08/08/2017	41	**Supreme Court Case Info** Case number: 17-204 Filed on: 08/02/2017 Cert Petition Action 1: Pending [10537109] (RR) [Entered: 08/08/2017 12:51 PM]
06/20/2018	42	**Supreme Court Case Info** Case number: 17-204 Filed on: 08/02/2017 Cert Petition Action 1: Granted,

06/18/2018

. The motion of ACT The App Association for leave to file a brief as amicus curiae is granted. The motion of Washington Legal Foundation for leave to file a brief as amicus curiae is granted. [10916131] (RR) [Entered: 06/20/2018 02:55 PM]

RELEVANT DOCKET ENTRIES

U.S. District Court
for the Northern District of California
Case No. 4:11-cv-06714-YGR

Date Filed	#	Docket Text
12/29/2011	1	COMPLAINT against Apple Inc. (Filing fee $ 350, receipt number 34611068684.). Filed byRobert Pepper, Edward W. Hayter, Harry Bass, Stephen H. Schwartz. (Attachments: # 1 Summons)(ga, COURT STAFF) (Filed on 12/29/2011) (Additional attachment(s) added on 1/11/2016: # 2 Summons issued **Correction of Attachment** 1) (kc, COURT STAFF). (Entered: 12/29/2011)
		* * *
03/02/2012	14	MOTION to Dismiss filed by Apple Inc.. Motion Hearing set for 4/16/2012 09:00 AM in Courtroom 9, 19th Floor, San Francisco before Hon. James Ware. Responses due by 3/16/2012. Replies due by 3/23/2012. (Attachments: # 1 Proposed Order)(Yates, Christopher) (Filed on 3/2/2012) (Entered: 03/02/2012)

* * *

03/16/2012	23	RESPONSE (re 14 MOTION to Dismiss) *Plaintiffs' Opposition to Defendant Apple Inc.'s Motion to Dismiss* filed byHarry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. (Rickert, Rachele) (Filed on 3/16/2012) (Entered: 03/16/2012)
03/16/2012	24	Declaration of Rachele R. Rickert in Support of 23 Opposition/ Response to Motion *Declaration of Rachele R. Rickert in Support of Plantiffs' Opposition to Defendant Apple Inc.'s Motion to Dismiss* filed byHarry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. (Related document(s) 23) (Rickert, Rachele) (Filed on 3/16/2012) (Entered: 03/16/2012)
03/20/2012	25	ORDER VACATING CASE MANAGEMENT CONFERENCE; CONSOLIDATING CASES; DENYING MOTION TO DISMISS AS MOOT, Cases associated., Motions terminated: (14 in 3:11-cv-06714-JW) MOTION to Dismiss filed by Apple Inc.. Signed by Judge James Ware on 3/20/12. (sis, COURT STAFF) (Filed on

		3/20/2012) (Entered: 03/20/2012)
03/21/2012	26	CONSOLIDATED CLASS ACTION COMPLAINT against Apple Inc. DEMAND FOR JURY TRIAL. Filed by Edward W. Hayter, Robert Pepper, Harry Bass, Stephen H. Schwartz, Eric Terrell, James Blackwell, Crystal Boykin. (Rickert, Rachele) (Filed on 3/21/2012) Modified on 3/22/2012 (far, COURT STAFF). (Entered: 03/21/2012)
03/26/2012	27	MOTION to Appoint Lead Plaintiff and Lead Counsel *Notice of Motion and Motion for Appointment of Interim Class Counsel; Memorandum of Points and Authorities* filed by Harry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. Motion Hearing set for 5/21/2012 09:00 AM in Courtroom 9, 19th Floor, San Francisco before Hon. James Ware. Responses due by 4/9/2012. Replies due by 4/16/2012. (Attachments: # 1 Proposed Order)(Rickert, Rachele) (Filed on 3/26/2012) (Entered: 03/26/2012)
03/26/2012	28	Declaration of Rachele R. Rickert in Support of 27 MOTION to Appoint Lead Plaintiff and Lead

		Counsel *Notice of Motion and Motion for Appointment of Interim Class Counsel; Memorandum of Points and Authorities* filed byHarry Bass, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz. (Attachments: # 1 Exhibit Exhibits A-B, # 2 Exhibit Exhibits C-F, # 3 Certificate/Proof of Service)(Related document(s) 27) (Rickert, Rachele) (Filed on 3/26/2012) (Entered: 03/26/2012)
		* * *
04/09/2012	34	ORDER by Judge James Ware granting 27 Motion to Appoint Lead Plaintiff and Lead Counsel (jwlc3, COURT STAFF) (Filed on 4/9/2012) (Entered: 04/09/2012)
		* * *
04/16/2012	36	Administrative Motion to File Under Seal *Defendant Apple Inc.'s Motion to Dismiss Plaintiffs' Consolidated Complaint* filed by Apple Inc.. (Attachments: # 1 Declaration in Support, # 2 Proposed Order)(Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	37	MOTION to Dismiss *[REDACTED]* filed by Apple Inc.. Motion Hearing set for 6/11/2012 09:00 AM in Courtroom 9, 19th

		Floor, San Francisco before Hon. James Ware. Responses due by 4/30/2012. Replies due by 5/7/2012. (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	38	Declaration of Eddy Cue in Support of 37 MOTION to Dismiss *[REDACTED]* filed byApple Inc.. (Related document(s) 37) (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	39	Declaration of Shari Ross Lahlou in Support of 37 MOTION to Dismiss *[REDACTED]* filed byApple Inc.. (Related document(s) 37) (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/16/2012	40	Proposed Order re 37 MOTION to Dismiss *[REDACTED]* by Apple Inc.. (Yates, Christopher) (Filed on 4/16/2012) (Entered: 04/16/2012)
04/25/2012	41	ORDER by Judge James Ware granting 36 Administrative Motion to File Under Seal (tdm, COURT STAFF) (Filed on 4/25/2012) (Entered: 04/25/2012)

04/25/2012	42	DOCUMENT E-FILED UNDER SEAL re 41 Order on Administrative Motion to File Under Seal *Defendant Apple Inc.'s Motion to Dismiss Plaintiffs' Consolidated Complaint* by Apple Inc.. (Attachments: # 1 Declaration of Eddy Cue In Support)(Yates, Christopher) (Filed on 4/25/2012) (Entered: 04/25/2012)
05/07/2012	43	Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]* filed by Harry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Rickert, Rachele) (Filed on 5/7/2012) (Entered: 05/07/2012)
05/07/2012	44	RESPONSE (re 43 Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]*) [*REDACTED*] filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen

H. Schwartz, Eric Terrell. (Rickert, Rachele) (Filed on 5/7/2012) (Entered: 05/07/2012)

05/07/2012	45	Declaration of Rachele R. Rickert in Support of 44 Opposition/ Response to Motion, *Declaration of Rachele R. Rickert In Support of Plaintiffs' Opposition To Defendant Apple Inc.'s Motion to Dismiss the Consolidated Complaint [REDACTED]* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 44) (Rickert, Rachele) (Filed on 5/7/2012) (Entered: 05/07/2012)

* * *

05/14/2012	47	RESPONSE (re 43 Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]*) filed byApple Inc.. (Yates, Christopher) (Filed on 5/14/2012) (Entered: 05/14/2012)
05/14/2012	48	MOTION to Compel *Arbitration of Claims* filed by Apple Inc.. Motion Hearing set for 6/18/2012 09:00 AM in Courtroom 9, 19th

		Floor, San Francisco before Hon. James Ware. Responses due by 5/29/2012. Replies due by 6/5/2012. (Attachments: # 1 Exhibit 1, # 2 Proposed Order)(Yates, Christopher) (Filed on 5/14/2012) (Entered: 05/14/2012)
		* * *
05/15/2012	50	Proposed Order re 43 Administrative Motion to File Under Seal *Plaintiffs' Notice of Motion and Administrative Motion to File Under Seal [Pursuant to Civil L.R. 7-11 And 79-5(d)]* by Apple Inc.. (Yates, Christopher) (Filed on 5/15/2012) (Entered: 05/15/2012)
		* * *
05/16/2012	52	ORDER GRANTING PLAINTIFFS' ADMINISTRATIVE MOTION TO FILE UNDER SEAL by Judge James Ware granting 43 Administrative Motion to File Under Seal. Signed by Judge James Ware on May 16, 2012. (wsn, COURT STAFF) (Filed on 5/16/2012) (Entered: 05/16/2012)
		* * *
05/18/2012	56	Administrative Motion to File Under Seal *the Reply in Support*

		of Motion to Dismiss Plaintiffs' Second Amended Complaint filed by Apple Inc.. (Attachments: # 1 Proposed Order)(Yates, Christopher) (Filed on 5/18/2012) (Entered: 05/18/2012)
05/18/2012	57	REPLY (re 37 MOTION to Dismiss *[REDACTED]*) filed byApple Inc.. (Yates, Christopher) (Filed on 5/18/2012) (Entered: 05/18/2012)
05/22/2012	58	ORDER GRANTING DEFENDANT APPLE INC.S ADMINISTRATIVE MOTION TO FILE UNDER SEAL signed by Judge James Ware granting 56 Administrative Motion to File Under Seal. (wsn, COURT STAFF) (Filed on 5/22/2012) (Entered: 05/22/2012)
05/22/2012	59	DOCUMENT E-FILED UNDER SEAL re 58 Order on Administrative Motion to File Under Seal *Defendant Apple Inc.'s Reply in Support of its Motion to Dismiss Plaintiffs' Consolidated Complaint* by Apple Inc.. (Yates, Christopher) (Filed on 5/22/2012) (Entered: 05/22/2012)
		* * *
05/29/2012	61	RESPONSE (re 48 MOTION to Compel *Arbitration of Claims*)

		filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)
05/29/2012	62	Declaration of Mark C. Rifkin in Support of 61 Opposition/ Response to Motion *Declaration of Mark C. Rifkin In Support of Plaintiffs' Opposition to Apple's Motion to Compel Arbitration* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 61) (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)
05/29/2012	63	Declaration of Simon J. Wilkie, PH.D. in Support of 61 Opposition/Response to Motion *Expert Declaration of Simon J. Wilkie, PH.D.* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 61) (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)

05/29/2012	64	Declaration of Michael A. Williams, PH.D. in Support of 61 Opposition/Response to Motion *Expert Declaration of Michael A. Williams, PH.D.* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 61) (Rifkin, Mark) (Filed on 5/29/2012) (Entered: 05/29/2012)
06/05/2012	65	REPLY (re 48 MOTION to Compel *Arbitration of Claims*) filed byApple Inc.. (Yates, Christopher) (Filed on 6/5/2012) (Entered: 06/05/2012)
06/08/2012	66	MOTION for Leave to File *Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48]* filed by Harry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Proposed Order [Proposed] Order Granting Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48])(Rickert, Rachele)

(Filed on 6/8/2012) (Entered: 06/08/2012)

06/08/2012 67 Declaration of Mark C. Rifkin in Support of 66 MOTION for Leave to File *Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48] Declaration of Mark C. Rifkin In Support of Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion to Compel Arbitration [ECF No. 48]* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 66) (Rickert, Rachele) (Filed on 6/8/2012) (Entered: 06/08/2012)

06/12/2012 68 RESPONSE (re 66 MOTION for Leave to File *Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Sur-Reply Brief On Apple Inc.'s Motion To Compel Arbitration [ECF No. 48]*) filed byApple Inc.. (Yates, Christopher) (Filed on 6/12/2012) (Entered: 06/12/2012)

06/15/2012 69 OBJECTIONS to re 67 Declaration in Support,, 62 Declaration in Support, *in*

		connection with Apple's Motion to Compel Arbitration by Apple Inc.. (Yates, Christopher) (Filed on 6/15/2012) (Entered: 06/15/2012)
06/18/2012	70	Minute Entry: Motion Hearing held on 6/18/2012 before Chief Judge James Ware re 48 MOTION to Compel; and 37 MOTION to Dismiss. (Date Filed: 6/18/2012). (Court Reporter Jim Yeomans.) (wsn, COURT STAFF) (Date Filed: 6/18/2012) (Entered: 06/18/2012)
06/21/2012	71	Transcript of Proceedings held on 06/18/12, before Judge James Ware. Court Reporter/Transcriber James Yeomans, Telephone number (415) 863-5179. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter/Transcriber until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 9/19/2012. (jjy, COURT STAFF)

(Filed on 6/21/2012) (Entered: 06/21/2012)

07/02/2012 72 MOTION for Leave to File *Plaintiffs' L.R. 7-3 Motion For Persmission To File A Supplemental Brief On Apple Inc.'s Motion To Dismiss [ECF No. 37] And Motion to Compel Arbitration [ECF No. 48]* filed by Harry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Proposed Order [Proposed] Order Granting Plaintiffs' Civil L.R. 7-3 Motion For Permission To File A Supplemental Brief On Apple Inc.'s Motion to Dismiss [ECF No. 37] And Motion To Compel Arbitration [ECF No. 48])(Rifkin, Mark) (Filed on 7/2/2012) (Entered: 07/02/2012)

07/02/2012 73 Declaration of Mark C. Rifkin in Support of 72 MOTION for Leave to File *Plaintiffs' L.R. 7-3 Motion For Persmission To File A Supplemental Brief On Apple Inc.'s Motion To Dismiss [ECF No. 37] And Motion to Compel Arbitration [ECF No. 48]* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W.

		Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Related document(s) 72) (Rifkin, Mark) (Filed on 7/2/2012) (Entered: 07/02/2012)
07/06/2012	74	RESPONSE (re 72 MOTION for Leave to File *Plaintiffs' L.R. 7-3 Motion For Persmission To File A Supplemental Brief On Apple Inc.'s Motion To Dismiss [ECF No. 37] And Motion to Compel Arbitration [ECF No. 48]*) filed byApple Inc.. (Yates, Christopher) (Filed on 7/6/2012) (Entered: 07/06/2012)
07/11/2012	75	ORDER by Judge James Ware granting in part and denying in part 37 Motion to Dismiss; denying 48 Motion to Compel; finding as moot 66 Motion for Leave to File; denying 72 Motion for Leave to File (jwlc2, COURT STAFF) (Filed on 7/11/2012) (Entered: 07/11/2012)
		* * *
09/28/2012	81	*AMENDED CONSOLIDATED CLASS ACTION COMPLAINT; JURY TRIAL* against Apple Inc.. Filed byCrystal Boykin, Robert Pepper, Edward W. Hayter, James Blackwell, Harry Bass, Eric Terrell, Stephen H.

		Schwartz. (Rickert, Rachele) (Filed on 9/28/2012) Modified on 10/1/2012 (cpS, COURT STAFF). (Entered: 09/28/2012)
		* * *
11/02/2012	87	MOTION to Relate Case and [Proposed] Order filed by Apple Inc. (Attachments: # 1 Proposed Order) (Yates, Christopher) (Filed on 11/2/2012) Modified on 11/5/2012 (cjl, COURT STAFF). (Entered: 11/02/2012)
11/02/2012	88	MOTION to Dismiss and [Proposed] Order filed by Apple Inc. Motion Hearing set for 12/18/2012 02:00 PM before Hon. Yvonne Gonzalez Rogers. Responses due by 11/16/2012. Replies due by 11/26/2012. (Attachments: # 1 Proposed Order)(Wall, Daniel) (Filed on 11/2/2012) Modified on 11/5/2012 (cjl, COURT STAFF). (Entered: 11/02/2012)
11/02/2012	89	Request for Judicial Notice re 88 MOTION to Dismiss filed byApple Inc.. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2)(Related document(s) 88) (Wall, Daniel) (Filed on 11/2/2012) (Entered: 11/02/2012)
		* * *

12/07/2012	99	RESPONSE (re 88 MOTION to Dismiss) *PLAINTIFFS MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT APPLES MOTION TO DISMISS THE AMENDED CONSOLIDATED COMPLAINT* filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Schmidt, Alexander) (Filed on 12/7/2012) (Entered: 12/07/2012)
12/07/2012	100	Declaration of Michael Liskow in Support of 99 Opposition/ Response to Motion, filed byHarry Bass, James Blackwell, Crystal Boykin, Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Related document (s) 99) (Liskow, Michael) (Filed on 12/7/2012) (Entered: 12/07/2012)
12/10/2012	101	Minute Entry: Initial Case Management Conference held on 12/10/2012 before Yvonne Gonzalez Rogers (Date Filed: 12/10/2012). Further Case

		Management Conference set for 12/17/2012 02:00 PM in Courtroom 5, 2nd Floor, Oakland. (Court Reporter Raynee Mercado.) (fs, COURT STAFF) (Date Filed: 12/10/2012) (Entered: 12/10/2012)
		* * *
12/18/2012	102	Transcript of Proceedings held on December 10, 2012, before Judge Yvonne Gonzalez Rogers. Court Reporter Raynee H. Mercado, CSR, Telephone number 510-451-7530, raynee_mercado@cand.uscourts.gov, rayneeh@hotmail.com. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Redaction Request due 1/8/2013. Redacted Transcript Deadline set for 1/18/2013. Release of Transcript Restriction set for 3/18/2013. (rhm) (Filed on 12/18/2012)

(Entered: 12/18/2012)

12/21/2012	103	REPLY (re 88 MOTION to Dismiss) filed byApple Inc.. (Huseny, Sadik) (Filed on 12/21/2012) (Entered: 12/21/2012)

* * *

03/05/2013	106	Minute Entry: Motion Hearing held and submitted on 3/5/2013 before Yvonne Gonzalez Rogers (Date Filed: 3/5/2013) re 88 MOTION to Dismiss filed by Apple Inc.. (Court Reporter Raynee Mercado.) (fs, COURT STAFF) (Date Filed: 3/5/2013) (Entered: 03/13/2013)
04/03/2013	107	Transcript of Proceedings held on March 5, 2013, before Judge Yvonne Gonzalez Rogers. Court Reporter Raynee H. Mercado, CSR, Telephone number 510-451-7530, rayneeh@hotmail.com, raynee_mercado@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request

		Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for 7/2/2013. (rhm) (Filed on 4/3/2013) (Entered: 04/03/2013)
08/15/2013	108	**ORDER by Judge Yvonne Gonzalez Rogers granting 88 Motion to Dismiss Plaintiffs' Amended Consolidated Complaint with Leave to Amend. (fs, COURT STAFF) (Filed on 8/15/2013) (Entered: 08/15/2013)**
		* * *
09/05/2013	111	AMENDED COMPLAINT CONSOLIDATED CLASS ACTION COMPLAINT (SECOND); Jury Demand against Robert Pepper, Edward W. Hayter, Eric Terrell, Stephen H. Schwartz. Filed byRobert Pepper, Edward W. Hayter, Eric Terrell, Stephen H. Schwartz. (Rickert, Rachele) (Filed on 9/5/2013) Modified on 9/6/2013 (cpS, COURT STAFF). (Entered: 09/05/2013)
		* * *
09/30/2013	115	MOTION to Dismiss *Plaintiffs' Second Amended Complaint* filed by Apple Inc.. Motion Hearing set

for 11/5/2013 02:00 PM in Courtroom 5, 2nd Floor, Oakland before Hon. Yvonne Gonzalez Rogers. Responses due by 10/15/2013. Replies due by 10/22/2013. (Attachments: # 1 Proposed Order)(Wall, Daniel) (Filed on 9/30/2013) (Entered: 09/30/2013)

10/15/2013 116 RESPONSE (re 115 MOTION to Dismiss *Plaintiffs' Second Amended Complaint*) *Memorandum of Points and Authorities In Opposition to Defendant Apple's Motion to Dismiss Plaintiffs' Second Amended Consolidated Complaint* filed byEdward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. (Attachments: # 1 Proposed Order Denying Defendant Apple's Motion to Dismiss Plaintiff's Second Amended Complaint)(Schmidt, Alexander) (Filed on 10/15/2013) (Entered: 10/15/2013)

* * *

10/22/2013 118 REPLY (re 115 MOTION to Dismiss *Plaintiffs' Second Amended Complaint*) filed byApple Inc.. (Wall, Daniel) (Filed on 10/22/2013) (Entered: 10/22/2013)

* * *

11/07/2013	121	Minute Entry: Motion Hearing held and submitted on 11/5/2013 before Yvonne Gonzalez Rogers (Date Filed: 11/7/2013) re 115 MOTION to Dismiss *Plaintiffs' Second Amended Complaint* filed by Apple Inc.. (Court Reporter Raynee Mercado.) (fs, COURT STAFF) (Date Filed: 11/7/2013) (Entered: 11/07/2013)

* * *

11/25/2013	123	Transcript of Proceedings held on November 5, 2013, before Judge Yvonne Gonzalez Rogers. Court Reporter Raynee H. Mercado, CSR, Telephone number 510-451-7530, cacsr8258@gmail.com, raynee_mercado@cand.uscourts.gov. Per General Order No. 59 and Judicial Conference policy, this transcript may be viewed only at the Clerks Office public terminal or may be purchased through the Court Reporter until the deadline for the Release of Transcript Restriction.After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction, if required, is due no later than 5 business days from date of this filing. Release of Transcript Restriction set for

		2/24/2014. (Related document(s) 122) (rhm) (Filed on 11/25/2013) (Entered: 11/25/2013)
12/02/2013	124	**ORDER by Judge Yvonne Gonzalez Rogers granting 115 Motion to Dismiss Plaintiff's Second Amended Complaint with Prejudice. (fs, COURT STAFF) (Filed on 12/2/2013) (Entered: 12/02/2013)**
		* * *
12/30/2013	126	Proposed Judgment by Apple Inc. (Yates, Christopher) (Filed on 12/30/2013) Modified on 12/31/2013 (kcS, COURT STAFF). (Entered: 12/30/2013)
12/31/2013	127	NOTICE OF APPEAL to the 9th CCA Edward W. Hayter, Robert Pepper, Stephen H. Schwartz, Eric Terrell. Appeal of Order on Motion to Dismiss 124 (Appeal fee of $505 receipt number 0971-8263870 paid.) (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Rickert, Rachele) (Filed on 12/31/2013) (Entered: 12/31/2013)
01/02/2014	128	USCA Case Number 14-15000 for 127 Notice of Appeal, filed by Stephen H. Schwartz, Robert Pepper, Eric Terrell, Edward W. Hayter. (cjl, COURT STAFF) (Filed on 1/2/2014) (Entered:

		01/02/2014)
01/07/2014	129	**JUDGMENT. Signed by Judge Yvonne Gonzalez Rogers on 1/7/2014. (fs, COURT STAFF) (Filed on 1/7/2014) (Entered: 01/07/2014)**
		* * *
01/12/2017	131	Opinion of USCA as to 127 Notice of Appeal, filed by Stephen H. Schwartz, Robert Pepper, Eric Terrell, Edward W. Hayter. REVERSED AND REMANDED. (cjlS, COURT STAFF) (Filed on 1/12/2017) Modified on 1/13/2017 (vlkS, COURT STAFF). (Entered: 01/12/2017)
		* * *
08/07/2017	133	USCA Case Number 17-204 US Supreme Court (petition for a writ of certiorari) (cjlS, COURT STAFF) (Filed on 8/7/2017) Modified on 6/21/2018 (cpS, COURT STAFF). (Entered: 08/08/2017)
		* * *
06/18/2018	135	ORDER of U.S. Supreme Court: Granting petition for a writ of certiorari as to 133 USCA Case Number 17-204. (cpS, COURT STAFF) (Filed on 6/18/2018) (Entered: 06/21/2018)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

In re Apple iPhone Antitrust Litigation	)	No. 3:11-06714-YGR
	)	
	)	**AMENDED**
	)	**CONSOLIDATED**
	)	**CLASS ACTION**
	)	**COMPLAINT**
	)	
	)	**DEMAND FOR JURY**
	)	**TRIAL**

Plaintiffs Robert Pepper, Stephen H. Schwartz, Edward W. Hayter, Harry Bass, Eric Terrell, James Blackwell, and Crystal Boykin ("Plaintiffs"), for their class action complaint, allege upon personal knowledge as to themselves and their own actions, and upon information and belief, including the investigation of counsel, as follows:

NATURE OF ACTION

1. This is an antitrust class action pursuant to section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2 (2004) (the "Sherman Act"), brought by Plaintiffs on their own behalf and on behalf of a class of persons similarly situated, those being persons who purchased an Apple iPhone from Defendant Apple Inc. ("Apple") or non-party AT&T Mobility, LLC ("ATTM"), or elsewhere, and then purchased applications for the iPhone from December 29, 2007 through the present (the "Class Period").

A. Summary Of Material Facts

2. Apple launched its iPhone on or about June 29, 2007. Prior to launch, Apple entered into a secret five-year contract with ATTM that established ATTM as the exclusive provider of cell phone voice and data services for iPhone customers through some time in 2012 ("Exclusivity Agreement"). As part of the contract, Apple shared in ATTM's revenues and profits with respect to the first generation of iPhones launched, known as the iPhone 2G, which was a unique arrangement in the industry. The Plaintiffs and other class members who purchased iPhones did not agree to use ATTM for five years. Apple's undisclosed five-year Exclusivity Agreement with ATTM, however, effectively locked iPhone users into using ATTM for five years, contrary to those users' knowledge, wishes and expectations.

3. To enforce ATTM's exclusivity, Apple, among other things, programmed and installed software locks on each iPhone it sold that prevented the purchaser from switching to another carrier that competed with ATTM in the cell phone voice and data services industry. Under an exemption to the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201, *et seq.* (2008) (the "DMCA"), cell phone consumers have an absolute legal right to modify their phones to use the network of their carrier of choice. Apple has prevented iPhone customers from exercising that legal right by locking the iPhones and refusing to give customers the software codes needed to unlock them.

4. Under its Exclusivity Agreement with ATTM, Apple retained exclusive control over the

design, features and operating software for the iPhone. To enhance its iPhone-related revenues, Apple enabled the creation of numerous software programs called "applications," such as ringtones, instant messaging, Internet access, gaming, entertainment, video and photography enabling software that can be downloaded and used by iPhone owners.

5. In March 2008, Apple released a "software development kit" ("SDK") for the stated purpose of enabling independent software developers to design applications for use on the iPhone. For an annual fee of $99, the SDK allows developers to submit applications to be distributed through Apple's applications market, the "iTunes App Store." If the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%. On information and belief, throughout the Class Period, Apple refused to "approve" any application by a developer who did not pay the annual fee or agree to Apple's apportionment scheme. Apple also unlawfully discouraged iPhone customers from downloading competing applications software (hereafter "Third Party Apps") by telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded Third Party Apps.

6. iPhone consumers were not provided a means by which they could download Third Party Apps that were not approved by Apple for sale on the App Store.

7. Through these actions, Apple has unlawfully stifled competition, reduced output and consumer choice, and artificially increased prices in the

aftermarkets for iPhone voice and data services and for iPhone software applications.

B. Summary Of Claims

8. In its July 11, 2012 Order Denying Without Prejudice Defendant's Motion to Compel Arbitration; Granting in Part Defendant's Motion To Dismiss [ECF No. 75], the Court dismissed Plaintiffs' claim of conspiracy to monopolize the iPhone voice and data services aftermarket in violation of Section 2 of the Sherman Act, with the mandate that "insofar as Plaintiffs wish to maintain such claims, ATTM must be added as a party." *Id.* at 16 n.29. Plaintiffs decline to add ATTM as a party, thereby recognizing that the conspiracy to monopolize claim (Count III) will remain dismissed. However, the conspiracy to monopolize claim has been retained in this amended complaint solely and exclusively to preserve the right of Plaintiffs individually and on behalf of the Class as defined in the Consolidated Class Action Complaint to challenge the claim's dismissal on appeal. *See, e.g., Lacey v. Maricopa County,* Nos. 09-15703, 09-15806, 2012 U.S. App. LEXIS 18320, at *67-68 (9th Cir. Aug. 29, 2012) ("For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal. But for any claims voluntarily dismissed, we will consider those claims to be waived if not repled.").

9. In pursuit and furtherance of its unlawful anticompetitive activities, Apple: (a) failed to obtain iPhone consumers' contractual consent to the five-year Exclusivity Agreement between Apple and ATTM, the effect of which was to lock consumers

into using ATTM as their voice and data service provider, even if they wished to discontinue their use of ATTM service; (b) failed to obtain iPhone consumers' contractual consent to having their iPhones "locked" to only accept ATTM Subscriber Identity Modules ("SIM cards"), thereby preventing iPhone purchasers from using any cell phone voice and data service provider other than ATTM; (c) failed to obtain iPhone consumers' contractual consent to make unavailable to them the "unlock code" that would enable the consumers to use a service other than ATTM, even though ATTM routinely provides such unlock codes for other types of cell phones; and (d) failed to obtain iPhone consumers' contractual consent to Apple prohibiting iPhone owners from downloading Third Party Apps.

10. Apple violated section 2 of the Sherman Act by conspiring with ATTM to monopolize the aftermarket for voice and data services for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices in that aftermarket.

11. Apple also violated section 2 of the Sherman Act by monopolizing or attempting to monopolize the software applications aftermarket for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices for those applications.

12. Plaintiffs seek declaratory and injunctive relief, treble and exemplary damages, costs and attorneys' fees. As for equitable relief, Plaintiffs seek an order: (a) restraining Apple from selling iPhones that are programmed in any way to prevent or hinder consumers from unlocking their SIM cards or from downloading Third Party Apps; (b) requiring

Apple to provide the iPhone SIM unlock codes to members of the class and other iPhone consumers immediately upon request; and (c) restraining Apple from selling or distributing locked iPhones without adequately disclosing the fact that they are locked to work only with ATTM SIM cards and without obtaining the consumers' contractual consent to have their iPhones locked.[1]

THE PARTIES

13. Plaintiff Robert Pepper is an individual residing in Chicago, Illinois who, on or about June 29, 2007, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

14. Plaintiff Stephen H. Schwartz is an individual residing in Ardsley, New York who, in October 2010, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

15. Plaintiff Edward W. Hayter is an individual residing in Brooklyn, New York who, in March 2008, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class Period.

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[1] Apple has released six models of the iPhone to date. From the earliest to most recent, the models are the iPhone 2G, the iPhone 3G, the iPhone 3GS, the iPhone 4, the iPhone 4S and the iPhone 5. Apple created the first three iPhones to operate only on the ATTM wireless network, as part of the Exclusivity Agreement. One version of the iPhone 4 is locked to work only on ATTM's network, while another version, which was released on February 3, 2011, works on Verizon's network. The iPhone 4S and iPhone 5 are designed to be able to operate on ***any*** domestic carrier's network

16. Plaintiff Harry Bass is an individual residing in Brooklyn, New York, who, in December 2008, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM' s stated rates during the Class Period.

17. Plaintiff Eric Terrell is an individual residing in Oakland, California who, on or about June 29, 2007, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class period.

18. Plaintiff James Blackwell is an individual residing in Pinole, California who, in October 2010, purchased an iPhone and paid for ATTM voice and data service for his iPhone at ATTM's stated rates during the Class period.

19. Plaintiff Crystal Boykin is an individual residing in Oakland, California who, in March 2008, purchased an iPhone and paid for ATTM voice and data service for her iPhone at ATTM's stated rates during the Class period.

20. Defendant Apple is a California corporation with its principal place of business located at 1 Infinite Loop, Cupertino, California 95014. Apple regularly conducts and transacts business in this District, as well as throughout Illinois, New York and elsewhere in the United States. Apple manufactures, markets, and sells the iPhone, among other electronic devices.

JURISDICTION AND VENUE

21. This Court has federal question jurisdiction pursuant to the Sherman Act, the Clayton Antitrust Act of 1914, 15 U.S.C. § 15 and pursuant to 28 U.S.C. § 1331 and 1337.

22. This Court also has jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(2) because sufficient diversity of citizenship exists between parties in this action, the aggregate amount in controversy exceeds $5,000,000, and there are 100 or more members of the proposed class.

23. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because some Plaintiffs purchased iPhones in this District, Apple has its principal place of business in this District, a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred here, and Apple is a corporation subject to personal jurisdiction in this District and, therefore, resides here for venue purposes.

24. Each Plaintiff and member of the Class, in order to activate their iPhone, was required to accept the "iPhone Terms and Conditions" (the "Terms"). The Terms state, in pertinent part, that "You expressly agree that exclusive jurisdiction for *any claim or dispute with Apple* or relating in any way to your use of the iTunes Service resides in the courts in the State of California." (emphasis added).

FACTUAL ALLEGATIONS

A. Plaintiffs' Injuries

25. In Spring 2007, Apple began a massive advertising campaign to market its new wireless communication device, the iPhone. The iPhone was advertised as a mobile phone, iPod and "breakthrough" Internet communications device with desktop-class email, an "industry first" "visual voicemail," web browsing, maps and searching capability.

26. The iPhone debuted on June 29, 2007, and despite its hefty $499 or $599 price tag,[2] consumers waited in line to get their hands on one.

27. Pursuant to the secret Exclusivity Agreement between Apple and ATTM described more fully below, during the Class Period the iPhone was sold at both Apple's and ATTM's retail and online stores, among other places.

28. Apple and ATTM entered into a five-year exclusive service provider agreement, which on information and belief was originally scheduled to expire in 2012, although it appears to have been terminated early by Apple before February 2011, when Verizon Wireless began selling voice and data service for the iPhone.

29. Each Plaintiff purchased one or more iPhones. Each Plaintiff also purchased wireless voice and data services from ATTM for their iPhones.

30. Prior to Plaintiffs' purchases of their iPhones and ATTM voice and data services, Apple had not even disclosed – much less obtained the Plaintiffs' contractual consent to – either (a) the existence of Apple's five-year Exclusivity Agreement with ATTM, or (b) that Apple's five-year agreement would effectively lock Plaintiffs into using ATTM as their voice and data service provider for the duration of the five-year agreement. In fact, neither Apple's nor ATTM's sales or customer service representatives were told about the length of the secret Exclusivity Agreement.

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[2] Initially, the 4GB iPhone 2G retailed for $499 and the 8GB iPhone 2G retailed for $599.

31. Prior to Plaintiffs' purchases of their iPhones and voice and data service, Apple had not disclosed – much less obtained Plaintiffs' contractual consent to – the fact (a) that Plaintiffs' iPhones were locked to only work with ATTM SIM cards, or (b) that the unlock codes would not be provided to them on request.

32. On information and belief, ATTM provides unlock codes for cell phones other than the iPhone if requested by a consumer.

33. Plaintiff Pepper wanted to have the option of switching to a competing domestic voice and data service provider other than ATTM.

34. Plaintiff Schwartz would like the ability to unlock his SIM card for international travel and to switch to a competing domestic voice and data service provider other than ATTM.

35. Plaintiff Hayter wanted to have the option of switching to a competing domestic voice and data service provider other than ATTM.

36. Plaintiff Bass wanted to have the option of switching to a competing domestic voice and data service provider other than ATTM.

B. The Cell Phone Industry

37. Cellular telephone service began to be offered to consumers in 1983. Cellular telephones operate using radio frequency channels allocated by the Federal Communications Commission ("FCC"). Geographical service areas, sometimes known as "cells," are serviced by base stations using low-power radio telephone equipment, sometimes known as "cell towers." The cell towers connect to a Mobile Telephone Switching Office ("MTSO"), which

controls the switching between cell phones and land line phones, accessed through the public-switched telephone network, and to other cell telephones.

38. In cellular service there are two main competing network technologies: Global System for Mobile Communications ("GSM") and Code Division Multiple Access ("CDMA"). GSM is the product of an international organization founded in 1987 dedicated to providing, developing, and overseeing a worldwide wireless standard. CDMA is an alternative technological platform, developed by Qualcomm, Inc., used in much of North America and parts of Asia.

39. To enable cell phones to send and receive emails, stream video and provide other services requiring higher data transfer speeds, both CDMA and GSM carriers adopted technologies to comply with what the industry refers to as "3rd or 4th generation," or "3G" or "4G" standards. These technologies require the cell phone to operate on a separate 3G or 4G network. The ATTM services provided to users of the first-generation iPhone were on ATTM's 2G network, whereas later versions of the iPhone operate on 3G and 4G networks.

40. While there are a number of cellular phone service providers in the United States, only four have substantial national networks: ATTM, T-Mobile USA, Inc. ("T-Mobile"), Sprint Corporation ("Sprint"), and Cellco Partnership d/b/a Verizon Wireless ("Verizon") (collectively, the "Major Carriers"). Other suppliers may in effect be "resellers" of cellular telephone service which they purchase from the Major Carriers. ATTM and T-Mobile operate GSM networks, while Sprint and Verizon operate CDMA networks.

41. ATTM and the other wireless carriers have long dominated and controlled the cell phone industry in the United States in a manner that, according to a *Wall Street Journal* article, "severely limits consumer choice, stifles innovation, crushes entrepreneurship, and has made the U.S. the laughingstock of the mobile-technology world, just as the cellphone is morphing into a powerful hand-held computer." Walter S. Mossberg, *Free My Phone*, WALL STREET JOURNAL, Oct. 22, 2007, at R3, col. 1.

42. Unlike the personal computer market in general – where computer manufacturers and software developers can offer products directly to consumers without having to gain the approval of Internet service providers, and without paying those providers a penny – the wireless carriers have used their ability to grant or deny access to their wireless networks to control both the type of cell phone hardware and software that can be manufactured and to extract payments from manufacturers granted access to their networks and customers. *Id.*

43. The anticompetitive nature of the wireless telephone market the carriers have created and facilitated gave rise to the commercial context in which Apple was able to commit the wrongs and offenses alleged herein.

C. The Cell Phone Industry's History Of Misusing Locked SIM Cards

44. In the United States, as a general rule, only GSM phones use SIM cards. The removable SIM card allows phones to be instantly activated, interchanged, swapped out and upgraded, all without carrier intervention. The SIM card itself is tied to the network rather than the actual phone.

Phones that are SIM card-enabled generally can be used with any GSM carrier.

45. Thus, the hardware of all GSM compatible cell phones give consumers some degree of choice to switch among GSM carriers' wireless networks by enabling them to replace their SIM card, a process that the average individual consumer easily can do with no training by following a few simple instructions in a matter of minutes. SIM cards are very inexpensive, now typically costing a few dollars. When the card is changed to the SIM card of another carrier, the cell phone is immediately usable on the other carrier's network. To switch from ATTM to T-Mobile, or the other way around, all that is required is this simple change of the SIM card.

46. For telephone users who travel, particularly to Europe, the ability to change SIM cards to a European carrier such as Orange, Vodaphone or TIM, allows the user of a GSM American phone to "convert it" to a "local" phone in the country where they have traveled. Absent a conversion to local service, a consumer using an American GSM cell phone abroad must pay both for the American service and for "roaming" charges, that is, the right to call or retrieve data from outside of the customer's primary calling area. Roaming charges are typically very high, often a dollar or more a minute. As a result, U.S.-based cell phone users traveling abroad can yield very substantial savings by switching the SIM card and paying for local service rather than using the U.S.-based GSM carrier.

47. In an effort to minimize consumers' ability to switch carriers or avoid roaming charges by simply switching SIM cards, the Major Carriers, acting in concert through trade associations and standards-

setting organizations such as the CDMA Development Group, the Telecommunications Industry Association, the Third Generation Partnership Project, the Alliance for Telecommunications, the Open Mobile Alliance, the CSM Association, the Universal Wireless Communications Consortium, and the Cellular Telephone Industry Association, and otherwise, agreed to implement "Programming Lock" features which effectively "locked" individual handsets so that they could not be used without the "unlocking" code. GSM carriers obtain a locking code (normally only six digits long) unique to each cell phone from the cell phone manufacturer. Absent obtaining the unlocking code from their GSM carrier, consumers who purchase a telephone manufactured to work with one of the two GSM Major Carriers can not switch to another carrier, even temporarily while traveling abroad, without buying an entirely new phone.

48. The two GSM carriers, ATTM and T-Mobile, adopted a SIM-lock standard that locked each GSM phone to a particular SIM card, thereby preventing consumers from simply changing their SIM cards to switch carriers. However, throughout the Class Period both T-Mobile and ATTM (for cell phones other than the iPhone) typically unlocked SIM cards on request for international travel, or even if customers wanted to cancel their accounts and switch to another carrier. In most cases, the unlock code was given on request, almost instantly, over the telephone.

49. Accordingly, ATTM unlocked SIM cards on telephones sold exclusively through them, such as the Blackberry Torch and the Samsung Blackjack.

There is but one exception: the iPhone. Even today, ATTM refuses to provide the unlock code for iPhones for international travel or otherwise.[3] That is because, as described more fully below, Apple and ATTM unlawfully agreed as part of the Exclusivity Agreement that the iPhone would not be unlocked under any circumstances.

D. Apple's Misuse Of Other Locked Program Codes

50. The iPhone operating system also contains "security measures" which are, in effect, Program Locks designed to restrict the consumer from using programs or services on the iPhone other than those sanctioned by, and which generate revenue for, Apple. By design, Apple programmed the iPhone in a manner that prevented iPhone purchasers from downloading any Third Party Apps offered by software manufacturers who did not share their revenues with Apple or pay a fee to Apple to sell through iTunes.

51. However, because of the design of the Apple operating system, which is based on the widely available Unix platform, Apple's initial efforts to

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[3] Despite the fact that the iPhone 4S can be operated on either a GSM or CDMA network, ATTM only allows customers to unlock their iPhones if they meet specific criteria, including having completed the full term of their service agreement. *See* http://www.att.com/esupport!article.jsp?sid=KB414532&cv820#fbid=P8B3TW1-RQ9 (requiring that "All contract obligations, including any term commitment, associated with the device to be unlocked have been fully satisfied."). By contrast, Verizon's iPhone 5 model is already unlocked when sold to customers. *See* http://www.tuaw.com/2012/09/24/verizon-iphone-5-ships-unlocked-likely-thanks-28to-fcc/.

eliminate Third Party Apps and to prevent iPhone customers from unlocking their SIM cards were ineffective, as clever consumers and programmers of Third Party Apps quickly circumvented Apple's locking codes and made both "unlocked" iPhones and "unlocking" software for iPhones available for sale on the Internet.

E. Apple Knows It Cannot Legally Prevent Consumers From Unlocking iPhones

52. Several years ago, the Major Carriers were subject to lawsuits that sought to impose liability based on the existence of Program Locks. Carriers had claimed that Program Locks were necessary to protect their copyrighted intellectual property and claimed then, as Apple has done, that the reason for the locks was to benefit consumers and protect against fraud. Carriers had also sought to assert that under the terms of the DMCA, disabling the Program Locks or unlocking a SIM card would be a violation of law.

53. The DMCA was enacted in 1998 to prohibit third parties from circumventing technological measures (called "access controls") that copyright owners had employed to control access to their protected intellectual property. However, in November 2006, the Librarian of Congress, who by statute has authority to create exemptions to the restrictions in section 1201 of the DMCA to ensure the public is able to engage in noninfringing uses of copyrighted works, announced a three-year exemption from the prohibition against circumvention of access controls for "[c]omputer programs in the form of firmware that enable wireless telephone handsets

to connect to a wireless telephone communication network, when circumvention is accomplished for the sole purpose of lawfully connecting to a wireless telephone communication network." The exemption stemmed from a recommendation by the Register of Copyrights, which concluded that "the access controls [on cell phones] do not appear to actually be deployed in order to protect the interests of the copyright owner or the value or integrity of the copyrighted work; rather, ***they are used by wireless carriers to limit the ability of subscribers to switch to other carriers, a business decision that has nothing whatsoever to do with the interests protected by copyright.***" Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68476 (Nov. 27, 2006) (emphasis added).

54. In 2009, the Librarian of Congress extended the initial three-year exemption applicable to cell phone access controls on an interim basis. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 74 Fed. Reg. 55138, 55139 (Oct. 27, 2009). On July 27, 2010, the Librarian of Congress issued a final rule to this effect. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825, 43832 (July 27, 2010).

55. Because Apple was unable to enforce its SIM card Program Locks through legal means, it engaged in a scheme to enforce them unlawfully as to the iPhone.

F. The Apple – ATTM Exclusivity Agreement

56. On January 9, 2007, a little over a month after the initial adverse Librarian of Congress ruling, Apple announced that it had entered into an exclusive agreement making ATTM the only authorized provider of wireless voice and data services for iPhones in the United States. Apple did not announce that the duration of that exclusive agreement was five years.

57. While the terms of that Exclusivity Agreement and any related agreements (collectively, the "Agreement") still have not been made public, some rumored details emerged. First, ATTM and Apple agreed to share ATTM's voice service and data service revenue received from iPhone customers. This was a unique arrangement in the industry and gave Apple strong motivation to force iPhone consumers to continue purchasing voice and data services from ATTM for as long as possible.

58. Second, while ATTM offered iPhone purchasers industry standard monthly voice and data service that could be terminated at any time prior to two years for a fee, Apple had secretly agreed to give ATTM iPhone exclusivity for five years, so that iPhone customers would have no choice but to continue purchasing voice and data services from ATTM until sometime in 2012 in order for their iPhone to continue to operate – even if the customers wanted to terminate their ATTM service early to switch to a less expensive carrier, such as T-Mobile in the United States.

59. Third, on information and belief, Apple and ATTM agreed to enforce ATTM's exclusivity by installing SIM card Program Locks on all iPhones and agreeing never to disclose the unlock codes to iPhone consumers who wished to replace the iPhone SIM card, either for international travel or to lawfully switch to another carrier.

60. Fourth, the Agreement allowed Apple to control the features, content, software programming and design of the iPhone.

61. Fifth, since both Apple and ATTM recognized that the iPhone would create a unique product for which consumers would pay a premium price compared to other cell phones, the pricing structure of the ATTM exclusivity deal was different than a typical agreement between a carrier and a handset manufacturer. Typically, the carrier subsidizes the purchase price of the handset (that is, sells the cell phone to the consumer at a substantial discount off the list price) in return for the consumer purchasing wireless service from the carrier for a period of time. This arrangement, the carriers argue, benefits the consumer by lowering the cell phone's price. The carriers, however, charge an early termination fee if consumers wish to discontinue their purchase of wireless service prior to the agreed upon length of time, which fee the carriers argue is justified by their subsidization of the cell phone price. Upon termination, the cell phone customer can obtain cell phone service from any carrier using the same network protocol (*i.e.*, GSM or CDMA).

62. In Apple's and ATTM's Agreement, ATTM did not agree to subsidize the purchase of the

iPhone handset initially but nevertheless still charged iPhone consumers a fee for terminating their voice and data service within the first two years. The early termination fee by AT'TM was not justifiable absent subsidization of the handset price. The benefits of the termination fee were also illusory because even those iPhone consumers who discontinued their AT'TM voice and data services by paying the early termination fee were prevented from obtaining wireless service for their iPhone from one of AT'TM's competitors domestically or abroad.

63. Sixth, on information and belief, AT'TM and Apple agreed that they would take action, legal or otherwise, to prevent users from circumventing the SIM card locks. A central purpose of this agreement was to suppress lawful competition domestically by T-Mobile against AT'TM in the iPhone aftermarket for voice and data services.

64. Finally, on information and belief, Apple and AT'TM agreed that Apple would be restrained for a period of time from developing a CDMA version of the iPhone to suppress competition by Sprint and Verizon. Apple and AT'TM agreed to this restraint notwithstanding that Apple could easily develop an iPhone for use on CDMA networks. In fact, Apple originally approached Verizon to be the iPhone exclusive service provider before Apple approached AT'TM.

65. None of the above details of the Exclusivity Agreement were disclosed to purchasers of the iPhone, by representatives of Apple and AT'TM or otherwise. Nor did any

iPhone purchaser ever contractually consent to any of those terms upon purchasing their iPhone.

66. On information and belief, Apple and ATTM ceased sharing ATTM's revenues, and reverted to a more traditional carrier-handset manufacturer arrangement whereby ATTM simply purchases the hand-sets from Apple without kicking back its future revenues to Apple, with respect to the iPhone 3G, iPhone 3GS, iPhone 4 and iPhone 4S. Apple and ATTM, however, continued to abide by and enforce the other anticompetitive terms of their Agreement, such as the Program Locks and their refusal to give consumers the unlock codes for their iPhones, in order to continue to suppress competition in the voice and data service aftermarket and to continue to enjoy the supracompetitive profits stemming from their Agreement.

G. Apple And ATTM Quickly Faced Unwanted Competition In The iPhone Aftermarkets

67. Almost immediately after the iPhone 2G was launched, Third Party Apps for the iPhone started to appear that generated competition for Apple in the applications aftermarket and for ATTM in the cellular voice and data service aftermarket. For example, Mobile Chat and FlickIM gave iPhone users access to instant messaging programs from which Apple derived no revenues.

68. Apple also faced competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any

portion of that song into a ringtone. A number of competing programmers promptly offered a variety of ringtone programs that enabled iPhone consumers to download both for free. Some of these programs allowed customers to use samples of popular songs lawfully downloaded from Apple's iTunes store as a ringtone for their iPhone. Other programs, such as I-Toner from Ambrosia Software and iPhone RingToneMaker from Efiko software, allowed customers to "clip" portions of songs purchased by them from iTunes for use as ringtones.

69. Since many of these programs used songs downloaded from iTunes, Apple initially sought to block the use of those songs as ringtones by updating the iTunes software to install Program Locks that would interfere with such use. However, those efforts were all quickly defeated by third party programmers, sometimes within hours of the release of the update.

70. The availability of Third Party Apps for iPhones reduced Apple's share of the iPhone aftermarket for ringtones and other applications and greatly reduced or threatened to reduce Apple's expected supracompetitive revenues and profits in that aftermarket.

71. The availability of SIM card unlocking solutions took a little longer and was more complicated. Initially, some customers sought to evade the program lock by altering the hardware. In August 2007, a high-school student announced the first "hardware unlocked" iPhone on YouTube. Shortly thereafter, software unlocks were developed and an explosion of unlock solutions, both free and for a fee, appeared on the Internet.

Many of the solutions involved a small change in the software, in some cases in as little as two bytes of code.

72. The availability of SIM card unlocking solutions enabled iPhone customers to lawfully terminate their AT&TM voice and data service if they were unhappy with AT&TM's service and switch to T-Mobile in the United States, and it enabled iPhone customers to avoid AT&TM's excessive international roaming charges by replacing the AT&TM SIM card with a local carrier's SIM card while traveling.

73. The availability of SIM card unlocking solutions reduced AT&TM's and Apple's share of the iPhone voice and data services aftermarket and threatened to reduce the supra competitive revenues and profits they conspired to earn.

CLASS ALLEGATIONS

74. Plaintiffs bring this action as a class action on behalf of themselves and all others similarly situated for the purpose of asserting claims alleged in this Complaint on a common basis. Plaintiffs' proposed class (hereinafter the "Class") is defined under Federal Rules of Civil Procedure 23(b)(2) and (3), and Plaintiffs propose to act as representatives of the following Class comprised of:

> **All persons, exclusive of Apple and its employees, who purchased an iPhone anywhere in the United States at any time, and who then also purchased applications from Apple from**

December 29, 2007 through the present (the "Class Period").

75. The Class for whose benefit this action is brought is so numerous that joinder of all members is impractical.

76. Plaintiffs are unable to state the exact number of Class members without discovery of Apple's records but, on information and belief, state that tens of millions of iPhones and billions of applications were purchased during the Class Period.

77. There are questions of law and fact common to the Class which predominate over any questions affecting only individual members including whether Apple violated section 2 of the Sherman Act by monopolizing or attempting to monopolize the aftermarket for iPhone software applications.

78. The common questions of law and fact are identical for each and every member of the Class.

79. Plaintiffs are members of the Class they seek to represent, and their claims arise from the same factual and legal basis as those of the Class; they assert the same legal theories as do all Class members.

80. Plaintiffs will thoroughly and adequately protect the interests of the Class, having obtained qualified and competent legal counsel to represent themselves and those similarly situated.

81. The prosecution of separate actions by individual class members would create a risk of inconsistent adjudications and would cause needless expenditure of judicial resources.

82. Plaintiffs are typical of the Class in that their claims, like those of the Class, are based on the same unconscionable business practices, and the same legal theories.

83. Apple has acted on grounds generally applicable to the Class.

84. A class action is superior to all other available methods for the fair and efficient adjudication of the controversy.

RELEVANT MARKET ALLEGATIONS

85. The iPhone is a unique, premium priced product that generates a unique aftermarket for voice and data services and software applications that can be used only on iPhones. During at least the Class Period, the price of iPhones was not responsive to an increase in iPhone service or application prices because: (a) consumers who purchased an iPhone could not, at the point of sale, reasonably or accurately inform themselves of the "lifecycle costs" (that is, the combined cost of the handset and its required services, parts and applications over the iPhone's lifetime); and (b) consumers were "locked into" the iPhone due to its high price tag and would incur significant costs to switch to another handset. The aftermarkets for iPhone voice and data services and applications are thus economically distinct product markets, and the service and application products that are sold within those markets had no acceptable substitutes. The geographic scope of the iPhone voice and data services and applications aftermarkets are national.

86. The aftermarkets for iPhone services and applications include: (a) the aftermarket for

wireless voice and data services (the "iPhone Voice and Data Services Aftermarket"); and (b) the aftermarket for software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic capability and Internet applications (the "Applications Aftermarket").

87. The iPhone Voice and Data Services Aftermarket came into existence immediately upon the sale of the first iPhones, because: (a) the iPhone Voice and Data Services Aftermarket is derivative of the iPhone market; (b) no Plaintiff or member of the Class contractually agreed to permit Apple to impose any restrictions in this aftermarket; (c) the Plaintiffs and members of the Class were entitled to terminate service with ATTM at any time upon payment of a termination fee; and (d) no Plaintiffs or members of the Class agreed with anyone to not purchase and use voice and data services from providers other than ATTM.

88. Similarly, the Applications Aftermarket came into existence immediately upon the sale of the first iPhones because: (a) the Applications Aftermarket is derivative of the iPhone market; and (b) no Plaintiff or member of the Class agreed to any restrictions on their access to the Applications Aftermarket.

COUNT I

Unlawful Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

89. Plaintiffs reallege and incorporate paragraphs 1 through 88 above as if set forth fully herein.

90. Apple has acquired monopoly power in the iPhone Applications Aftermarket through unlawful, willful acquisition or maintenance of that power. Specifically, Apple has unlawfully acquired monopoly power by: (a) "approving" only applications that generate revenues for Apple, and/or that are submitted to Apple for approval after the developer pays Apple an annual fee of $99; (b) discouraging iPhone customers from using competing Third Party Apps by spreading misinformation; and (c) programming the iPhone operating system in a way that prevents iPhone customers from downloading Third Party Apps, disables Third Party Apps and/or disables or destroys the full functionality of the iPhones of users who download Third Party Apps.

91. Apple's unlawful acquisition of monopoly power has reduced output and competition and resulted in increased prices for products sold in the iPhone Applications Aftermarket and, thus, harms competition generally in that market.

92. Plaintiffs have been injured in fact by Apple's unlawful monopolization because they have: (a) been deprived of lower cost alternatives for applications; (b) been forced to pay higher prices for Apple "approved" applications; and/or (c) had their iPhones disabled or destroyed.

93. Apple's unlawful monopolization of the iPhone Applications Aftermarket violates section 2 of the Sherman Act, and its unlawful monopolization practices are continuing and will

continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's unlawful monopolization, and Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proved at trial.

COUNT II

Attempted Monopolization Of The Applications Aftermarket In Violation Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

94. Plaintiffs reallege and incorporate paragraphs 1 through 93 above as if set forth fully herein.

95. Defendant Apple has engaged in exclusionary, predatory and anticompetitive conduct with a specific intent to monopolize the iPhone Applications Aftermarket. Specifically, Apple has attempted unlawfully to acquire monopoly power by: (a) "approving" only applications that generate revenues for Apple, and/or that are submitted to Apple for approval after the developer pays Apple an annual fee of $99; (b) discouraging iPhone customers from using competing Third Party Apps by spreading misinformation; and (c) programming the iPhone operating system in a way that prevents iPhone customers from downloading Third Party Apps, disables Third Party Apps and/or disables or destroys the full functionality of the iPhones of users who download Third Party Apps. Apple did not have a legitimate business justification for any of these actions.

96. Apple's anticompetitive actions have created a dangerous probability that Apple will achieve monopoly power in the Applications Aftermarket because Apple has already unlawfully achieved an economically significant degree of market power in that market and has effectively foreclosed new and potential entrants from entering the market or gaining their naturally competitive market shares.

97. Apple's attempted acquisition of monopoly power has reduced output and competition and resulted in increased prices for products sold in the iPhone Applications Aftermarket and, thus, harms competition generally in that market.

98. Plaintiffs have been injured in fact by Apple's attempted monopolization because they have: (a) been deprived of lower cost alternatives for applications; (b) been forced to pay higher prices for Apple "approved" applications; and/or (c) had their iPhones disabled or destroyed.

99. Apple's attempted monopolization of the iPhone Applications Aftermarket violates section 2 of the Sherman Act, and its anticompetitive practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apple's attempted monopolization, and Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proved at trial.

COUNT III [PRESERVED FOR APPEAL]

Conspiracy To Monopolize The iPhone Voice And Data Services Aftermarket In Violation

Of Section 2 Of The Sherman Act (Seeking Damages And Equitable Relief)

100. Plaintiffs reallege and incorporate paragraphs 1 through 99 above as if set forth fully herein.

101. Apple knowingly and intentionally conspired with ATTM with the specific intent to monopolize the iPhone Voice and Data Services Aftermarket. In furtherance of the conspiracy, Apple and its co-conspirator agreed without Plaintiffs' knowledge or consent to make ATTM the exclusive provider of voice and data services for the iPhone for five years, contrary to Plaintiffs' reasonable expectations that they could switch at any time to another carrier in the first two years that they owned their iPhone after paying the $175 early termination fee, and without charge after that period.

102. ATTM unlawfully achieved an economically significant degree of market power in the iPhone Voice and Data Services Aftermarket as a result of the conspiracy and effectively foreclosed new and potential entrants from entering the market or gaining their naturally competitive market shares.

103. Apple and ATTM's conspiracy reduced output and competition and resulted in increased prices in the iPhone Voice and Data Services Aftermarket and, thus, harmed competition generally in that market.

104. Plaintiffs were injured in fact by Apple and ATTM's conspiracy because they were: (a) deprived of alternatives for voice and data services domestically; and (b) forced to pay

supracompetitive prices for iPhone voice and data services.

105. Apple's conspiracy to monopolize the iPhone Voice and Data Services Aftermarket violated Section 2 of the Sherman Act, and its anticompetitive practices are continuing and will continue unless they are permanently enjoined. Plaintiffs and members of the Class have suffered economic injury to their property as a direct and proximate result of Apples' conspiracy, and Apple is therefore liable for treble damages, costs and attorneys' fees in amounts to be proven at trial.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment against Apple as follows:

a. Permanently enjoining Apple from selling locked iPhones that can only be used with ATTM SIM cards unless such information is adequately disclosed to consumers prior to sale;

b. Ordering Apple to provide the unlock code upon request to all members of the Class who purchased an iPhone prior to the disclosures described above;

c. Permanently enjoining Apple from monopolizing or attempting to monopolize the iPhone Applications Aftermarket;

d. Permanently enjoining Apple from conspiring to monopolize the iPhone Voice and Data Services Aftermarket;

e. Awarding Plaintiffs and the Class treble damages for injuries caused by Apple's violations of the federal antitrust laws;

f. Awarding Plaintiffs and the Class reasonable attorneys' fees and costs; and

g. Granting such other and further relief as the Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiffs hereby demand a trial by jury.

DATED: September 28, 2012

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[DECLARATION OF SERVICE omitted]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR RELATED CASE NO. C 07-05152-JW **DEFENDANT APPLE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' AMENDED CONSOLIDATED COMPLAINT** Date: December 18, 2012 Time: 2:00 P.M. Place: Courtroom TBD The Honorable Yvonne Gonzalez Rogers

* * *

VI. THE APPS ANTITRUST CLAIMS MUST BE DISMISSED

A. The Factual Allegations

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. . . Paragraph 5 summarizes the restrictions that Plaintiffs apparently take issue with: (1) that developers use a particular SDK if they want to distribute apps through the App Store and the $99

charge for the SDK; (2) that developers submit Apps to Apple for review and approval prior to being made available on the App Store; and (3) that developers pay Apple 30% of the sales price of any paid App sold through the App Store. Compl. ¶ 5.

This information was prominently announced by Apple. Indeed, the allegations in paragraph 5 of the Complaint refer to Apple's March 2008 announcement regarding the creation of its App Store, which set forth the terms under which Apps would be made available to iPhone owners:

> The App Store enables developers to reach every iPhone and iPod touch user. **Developers set the price for their applications—including free—and retain 70 percent of all sales revenues.** Users can download free applications at no charge to either the user or developer, or purchase priced applications with just one click. Enterprise customers will be able to create a secure, private page on the App Store accessible only by their employees. Apple will cover all credit card, web hosting, infrastructure and DRM costs associated with offering applications on the App Store. **Third party iPhone and iPod touch applications must be approved by Apple and will be available exclusively through the App Store.**

Request for Judicial Notice ("RJN"), Ex. 1 (emphasis added).[4]

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[4] As set forth in greater detail in Apple's accompanying Request for Judicial Notice, the Court may take judicial notice

* * *

B. Plaintiffs Do Not Have Standing To Pursue Their Apps Claims

* * *

2. Plaintiffs Are Indirect Purchasers And Lack Antitrust Standing Under *Illinois Brick*

* * *

. . . This is incurable. Plaintiffs are, if anything, Apps consumers—not Apps developers. *E.g.*, Compl. ¶¶ 13-19. Consumers download Apps available through Apple's App Store. Plaintiffs' complaint is that consumers are indirect victims of Apple's policies because (a) Apple restricts developers in various ways, (b) this leads to fewer or more expensive Apps, and (c) consumers suffer accordingly. Compl. ¶¶ 5-7. In fact, Plaintiffs assert that because *developers* must pay Apple a $99 yearly developer fee and 30% of each paid App, the putative class has been injured because it has "(a) been deprived of lower cost alternatives for applications; (b) been forced to pay higher prices for Apple "approved" applications; and/or (c) had their iPhones disabled or destroyed." Compl. ¶ 92.

The problem with this reasoning is that it runs straight into the rule established by the Supreme

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of Apple's press releases, especially where, as here, the Complaint purports to summarize portions of them. *Yang v. Dar Al-Handash Consultants*, 250 Fed. Appx. 771, 772 (9th Cir. 2007); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

Court in *Illinois Brick*, that *indirect* victims of anticompetitive conduct do not have standing to bring the claim. 431 U.S. at 730-31, 734. As the Ninth Circuit recently made clear, "a bright line rule emerged from *Illinois Brick*: only direct purchasers have standing under § 4 of the Clayton Act to seek damages for antitrust violations." *In re ATM Fee Antitrust Litig.*, 686 F.3d at 748.

* * *

Here, Apple's alleged wrongful conduct restricts developers. Everything else that follows is an indirect effect. The developer sets the price of the Apps and, in accordance with Apple's App Store policies, the developer pays Apple 30% of the price of any downloaded Apps. It is that antecedent transaction between Apple and the developer that the Complaint asserts causes an unlawful increase in the price of Apps, which means that Plaintiffs are indirect purchasers. The antecedent nature of the $99 annual developer fee is even more clear: these are fees that the developers owe and thus pay directly to Apple, without any involvement by consumers. Plaintiffs lack antitrust standing to bring their Apps claims in this Court, and there is no amendment that can cure this failing. The Apps claims should be dismissed with prejudice.

C. Plaintiffs Fail To Plead The Requisite Elements Of Their Antitrust Claims

2. Plaintiffs Fail To Allege Unlawful Anticompetitive Conduct

* * *

Plaintiffs' allegations are about a collection of policies whereby Apple provides a platform for the development and distribution of Apps for the iPhone. Apple has always been very clear about its view that the iPhone platform would be better and more competitive if Apps were approved by Apple and downloaded through a safe and secure App Store free of pornography, malware, and content that could harm cellular networks. So the few factual allegations that Plaintiffs make about Apple's Apps policies, drawn from Apple's press releases, were and are well known: developers must submit Apps to Apple for approval, approved Apps are only to be distributed through the App Store, Apple gets 30% of the price of paid Apps (and nothing with respect to free Apps), and iPhones, by design, do not provide iPhone customers with a means to download Apps other than from Apple's App Store. Compl. ¶¶ 5-7.[10]

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[10] To be clear, while it is true that developers are restricted by policy from distributing the particular software embodiment of their Apps intended solely for loading onto Apple's devices (i.e., the version of the App designed, programmed and intended solely for Apple devices) through portals other than the App Store, there are no allegations that this is a restriction on any developer's right or ability to create and distribute versions of the very same applications programmed to work with different operating system platforms. Nor could there be—there are innumerable examples of developers creating versions of popular Apps (*e.g.*, Facebook) for the many platforms that compete with Apple (*e.g.*, Google Android). And consumers are of course free to choose that competing platform and access the very same software applications, to the extent a developer has chosen to create a version of their application for the alternate platforms.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE & AT&T IPHONE ANTITRUST LITIGATION	Case No. C 11-06714-YGR Related Case No. C 07-05152-JW **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT APPLE'S MOTION TO DISMISS THE AMENDED CONSOLIDATED COMPLAINT** DATE: January 15, 2013 Time: 2:00 P.M. CRTRM: TBD JUDGE: Hon. Yvonne Gonzalez Rogers

* * *

C. **Apple's Arguments in Any Event Lack Merit**

1. **Plaintiffs are Direct Purchasers with Antitrust Standing**

. . . The Amended Complaint plainly alleges that Plaintiffs purchased ***directly from Apple*** certain Apps that were ***made by Apple itself***, Compl. ¶¶ 63-66, such as songs converted into ringtones, for

which "Apple charged the customer an additional 99 cents," *id.* ¶ 64. Plaintiffs also allege that iPhone consumers were forced to buy third party developers' applications ***directly from Apple's Apps Store***, and that iPhone consumers were forced ***to pay Apple*** a 30% fee on top of the cost for the apps. *Id.* at ¶¶ 4-5.

* * *

Apple admits that Plaintiffs are "Apps consumers" – that is, Apps purchasers – (*see* Def. Mem. at 9), but then completely ignores Plaintiffs' allegations about Apple's own-manufactured apps, which are made only by Apple and sold only by Apple. Plaintiffs undoubtedly are direct purchasers of those apps. Apple then attempts to convolute Plaintiffs' allegations about third-party apps to make it appear as though the apps developers, rather than iPhone consumers, were the direct purchasers of third-party apps. *See* Def. Mem. at 9. Putting aside that Apple's illogical version bears little resemblance to what Plaintiffs actually allege, Apple's argument still fails to identify an indirect purchase because under Apple's argument the developers are not purchasers of the apps at all: the developers ***make*** the third-party apps, they do not buy them from Apple. The only purchasers of apps are iPhone consumers, who must purchase third party apps – the tainted product – directly from Apple exclusively on its Apps Store. And iPhone consumers pay the challenged supracompetitive 30% fee directly to the Apps Store at the time of purchase.

As the Ninth Circuit has recently reiterated in the case that Apple itself relies upon, the *sine qua non* for direct purchaser status is ***whether the***

plaintiff paid the alleged unlawful fee directly to the alleged wrongdoer. *In re ATM Fee Antitrust Litig.*, 686 F.3d at 746, 751 (upholding district court's finding of indirect purchaser status where the plaintiffs admitted they "did not directly pay the alleged fixed interchange fees" to the alleged wrongdoer). Under the Ninth Circuit's straightforward standing test, because Plaintiffs paid the alleged unlawful price – here Apple's 30% fee – directly to Apple (the alleged monopolist), they are direct purchasers and have standing to sue Apple under Ninth Circuit jurisprudence. *Id.* at 754.

Apple mistakenly focuses on the $99 annual fee that apps developers pay Apple for the right to distribute their apps through Apple's Apps Store to argue that the developers, too, are "victims" of Apple, in an effort to twist the facts here to resemble those in the Eighth Circuit's *Campos v. Ticketmaster* case. Here, of course, Plaintiffs do not challenge the $99 fee that the developers paid to Apple since Plaintiffs never paid that fee themselves. Rather, Plaintiffs challenge only the 30% fee that they paid directly to Apple. That the developers may also be victims of Apple as to the $99 annual fee is completely irrelevant to whether Plaintiffs are direct purchasers as to the totally distinct 30% apps fee under Ninth Circuit law.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR Related Case Nos. C 07-05152-JW and C 11-06714-YGR
ZACK WARD and THOMAS BUCHAR, on behalf of themselves and all others similarly situated, Plaintiffs, v. APPLE INC., Defendant	**REPLY IN SUPPORT OF DEFENDANT APPLE INC.'S MOTION TO DISMISS PLAINTIFFS' AMENDED CONSOLIDATED COMPLAINT** Date: January 15, 2013 Time: 2:00 P.M. Place: Courtroom 5 The Honorable Yvonne Gonzalez Rogers

* * *

I. INTRODUCTION

* * *

. . . The Complaint alleges that Apple "artificially increased" prices for Apps through an

"apportionment scheme" whereby App developers agree to pay Apple 30% of the sales price of Apps. This allegation is fatal to Plaintiffs' standing. These Plaintiffs do not have antitrust standing under the Supreme Court's *Illinois Brick* decision since the 30% fee that supposedly leads to the "artificially inflated" prices for Apps is a separate arrangement between the App developer and Apple. The Ninth Circuit recently held in *In re ATM Fees Antitrust Litigation* that *Illinois Brick* barred a substantively identical challenge to a fee arrangement between banks that allegedly led to an overpayment by consumers.

* * *

V. PLAINTIFFS' APPS CLAIMS FAIL AND MUST BE DISMISSED

A. Plaintiffs Do Not Have Antitrust Standing

* * *

Plaintiffs now assert that "iPhone consumers were forced ***to pay Apple*** a 30% fee on top of the cost for the apps." (Opp. at 11 (emphasis Plaintiffs', citing Complaint ¶¶ 4-5).) The plain import of this is that Apple takes the price for an App set by the developer and adds to it, the way a retailer might add sales tax to the price of an item, a 30% fee. That does not matter legally, as the *Ticketmaster* decision makes clear.[4] But plaintiffs have a more fundamental problem because paragraphs 4 and 5 of

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[4] *See Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998).

the Complaint, which they cite, make no mention of a fee paid by consumers on top of the cost for the Apps. Indeed, nowhere in the complaint is such a fee mentioned.[5] This is not an accident because there is no good faith basis to allege that. Plaintiffs acknowledge that *Apple does not charge consumers a 30% fee on top of the cost for the Apps*; rather, Apple *charges developers* a 30% fee on Apps that they elect to offer as "paid" on the App Store (Apple charges nothing on Apps that the developers elect to offer as free). Complaint ¶ 5; Mot. Dismiss at 7.

The whole thrust of the Complaint is about "Apple's apportionment scheme" for sales revenue earned by third party developers of Apps. Complaint ¶ 5. Plaintiffs acknowledge that "[d]evelopers set the price of their applications—including free" (RJN Ex. 1), but they surmise that because developers only "retain 70 percent of all sales revenues" (*id.*; Complaint ¶ 5), *developers* have an incentive to charge higher prices to consumers for their apps, resulting in "artificially increased prices . . . for iPhone software applications." Complaint ¶ 7. The pleadings thus acknowledge that the developer turns over 30% of the price it sets to Apple.

This is what makes ***ATM Fee*** directly on point.[6] The plaintiffs in that case challenged bank

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[5] By contrast, fees that actually were paid by certain class members to ATTM, such as "roaming charges" and the "early termination fee," are discussed in the Complaint. *See* Complaint ¶¶ 46, 47, 61, 62, 87, 101.

[6] ***ATM Fee*** issued long after Judge Ware's class certification order which contains the quotation cited by Plaintiffs in which Judge Ware pointed to a lack of Ninth Circuit authority. (*See* Opp. at 5.) There is now controlling Ninth Circuit authority,

"interchange fees" that they did not pay but which they claimed led to higher foreign ATM fees that they did pay: "Plaintiffs concede that they have never directly paid interchange fees. Instead, card-issuing banks (including Bank Defendants) pay interchange fees and then include them when they charge foreign ATM fees (alleged by Plaintiffs to be artificially inflated). In other words, the Bank Defendants pass on the cost of the interchange fees through the foreign ATM fees." *Id.* at 750-51. Even though the plaintiffs did directly pay allegedly inflated ATM fees (because the banks supposedly passed on the interchange fee), the Ninth Circuit held that the claims were barred by *Illinois Brick*. *Id.*

Plaintiffs' theory is identical: the "apportionment scheme" supposedly leads Apps developers to "pass on" the 30% fee by charging higher prices for their Apps—just as the bank interchange fees were allegedly "passed on" and led to higher ATM fees in *ATM Fees*. Plaintiffs' complaint is thus barred by *Illinois Brick* because Apps developers are the proper party to sue over a claim concerning the "apportionment scheme." *Id.*[7]

* * *

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never considered by Judge Ware, that mandates dismissal of Plaintiffs' claims for lack of antitrust standing.

[7] Plaintiffs raise a strawman by claiming that Apple contends developers are the "direct purchasers" of Apps. (Opp. at 12.) That is not the case. Apple simply takes the legally correct and factually obvious position that developers are the party directly involved in the antecedent transaction that Plaintiffs complain of: the "apportionment scheme" with Apple. Complaint ¶ 5.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

IN RE APPLE IPHONE ANTITRUST LITIGATION	)	PAGES 1 – 22
	)	No. C 11-06714 YGR
	)	OAKLAND, CALIFORNIA
	)	TUESDAY, MARCH 5, 2013

TRANSCRIPT OF PROCEEDINGS

* * *

[2]

* * *

... IN LIGHT OF SOME OF THE PROCEDURAL OBJECTIONS, I WAS GOING TO SUGGEST WE JUST FOCUS ON TWO ISSUES WHICH I THINK MINIMIZE ANY OF THE -- THE PROCEDURAL ISSUES. AND THOSE ARE THE ILLINOIS BRICK ISSUE, THE INDIRECT [3] PURCHASER ISSUE, AND THEN -- THE QUESTION OF WHETHER THEY'VE STATED A CLAIM FOR ANTICOMPETITIVE CONDUCT.

WE ARE -- JUDGE WARE DID A LOT IN THE PRIOR LITIGATION, BUT ONE THING HE DID NOT HAVE THE BENEFIT OF WAS THE NINTH CIRCUIT'S DECISION IN THE ATM CASE

BECAUSE IT HADN'T COME OUT AT THE TIME THAT HE ONLY -- THE ONLY TIME HE REFERENCED THE INDIRECT PURCHASER ISSUE, WHICH WAS, ODDLY ENOUGH, IN A CLASS CERTIFICATION MOTION.

AND SINCE THEN, THE ATM DECISION HAS COME DOWN, AND IT -- IT REALLY ELIMINATED JUDGE WARE'S CONCERN THAT THE NINTH CIRCUIT HADN'T REALLY ADDRESSED THE QUESTION THAT IT PRESENTED BY THEIR APPLICATIONS CLAIM, AND THAT IS WHAT HAPPENS WHEN THERE'S AN ALLEGED ANTICOMPETITIVE ACT THAT IMPOSES A COST ON SOMEONE WHO MAKES SOMETHING AND THEN PUTS IT INTO -- INTO -- INTO COMMERCE.

AND SO THE FACTS THERE – WE ALL CAN RELATE TO THIS BECAUSE WE ALL HAVE ATM CARDS. WHEN YOU GO AND -- SAY, IF YOU'RE A WELLS FARGO BANK CARDHOLDER AND YOU HAPPEN TO NOT BE ABLE TO FIND A WELLS FARGO. YOU CAN GO TO ANOTHER MACHINE, BUT YOU'RE GOING TO BE CHARGED A COUPLE OF FEES. ONE OF THEM IS A SURCHARGE FEE, WHICH IS ACTUALLY CHARGED BY WHOEVER OWNS THE ATM FEE (SIC), BUT YOU'RE ACTUALLY ALSO CHARGED A FEE BY YOUR OWN BANK. YOUR OWN BANK CHARGES YOU WITH SOMETHING -- SOMETHING CALLED A FOREIGN ATM FEE. AND THE ALLEGATION IS THAT'S A LITTLE HIGHER THAN IT SHOULD HAVE BEEN BECAUSE THE [4] BANK IS PAYING SOMETHING CALLED AN INTERCHANGE FEE

AS PART OF ITS PARTICIPATION IN AN ATM NETWORK.

AND THE PLAINTIFFS IN THAT CASE WERE A CLASS OF CONSUMERS, AS HERE. THEY TRIED TO SAY THAT THEY WERE ABLE TO AVOID THE INDIRECT PURCHASER DOCTRINE BECAUSE THEY ACTUALLY WERE THE ONES WHO PUT THEIR CARD INTO THE MACHINE AND HAD TO PAY THE FEE.

BUT THE NINTH CIRCUIT SAYS, THAT'S NOT REALLY WHAT'S -- WHAT THE GRAVAMEN OF THE COMPLAINT IS. THE GRAVAMEN OF THE COMPLAINT IS THAT SOMETHING THAT HAPPENED BEFORE THAT IS AFFECTING THE PRICE OF THAT FEE. THAT'S AN INDIRECT PURCHASER CLAIM. IT'S BARRED BY ILLINOIS BRICK.

NOW, IN THIS CASE, THE APPS CLAIMS, WHICH ARE THE ONLY CLAIMS THAT CAN REALLY REMAIN IN THIS AFTER THEIR DECISION NOT TO NAME AT&T AS A PLAINTIFF -- OR IF ANYTHING, A STRONGER VERSION OF THOSE FACTS. AND, AGAIN, WE ALL PROBABLY HAVE SOME COMMON EXPERIENCE ABOUT THIS.

IF YOU WANT TO PLAY "ANGRY BIRDS"," YOU CAN YOU GO TO THE APP. STORE, AND YOU CAN BUY IT. THE PRICE FOR THAT IS SET BY WHOEVER IT IS WHO MAKES "ANGRY BIRDS." IT'S NOT SET BY APPLE. IT'S SET BY WHOEVER MAKES "ANGRY BIRDS." BUT IN ORDER TO USE THE APP. STORE, THEY'RE GOING -- BECAUSE IT'S A PAID APP RATHER

THAN A FREE APP, THEY WILL HAVE TO TURN OVER 30 PERCENT OF WHATEVER THEY DECIDE TO CHARGE TO APPLE. THAT'S WHAT'S STATED IN PARAGRAPH 5 OF THE COMPLAINT. AND ON ACCOUNT OF [5] THAT, THE IDEA IS THAT THEY WILL RATIONALLY SET A DIFFERENT PRICE THAN THEY WOULD HAVE CHARGED IF DISTRIBUTION WERE FREE.

THAT'S EXACTLY THE SAME MODEL -- THE KEY POINT UNDER THE NINTH CIRCUIT'S ATM DECISION IS THAT APPLE ISN'T SETTING THE PRICE OF "ANGRY BIRDS." SOMEBODY ELSE IS.

AND AS A RESULT OF -- OF THAT, THE -- IT -- THAT PERSON'S CUSTOMER, WHICH ARE THESE PLAINTIFFS, IS AN INDIRECT PURCHASER, NOTWITHSTANDING THE FACT THAT THEY'RE ACTUALLY MAKING THE DEAL, BUYING IT THROUGH APPLE AND PAYING APPLE IN THE FIRST INSTANCE.

THE PLAINTIFFS IN THE ATM -- PAID THE BANK THROUGH THE CREDIT CARD. THE MERCHANTS IN THE KENDALL VS. VISA CASE--

* * *

MR. SCHMIDT: YOUR HONOR, IT'S -- IT'S BLACK LETTER LAW THAT AN INDIRECT PURCHASER IS SOMEONE WHO BUYS AFTER THE DIRECT PURCHASER BUYS. AND WHAT THEY BUY IS THE TAINTED PRODUCT. HERE, THE TAINTED -- THE TAINTED FEE, THE FEE

SET BY THE MONOPOLIST APPLE IS THE 30 PERCENT FEE THAT APPLE CHARGES.

THE COURT: THE PRODUCT IS WHAT?

MR. SCHMIDT: IT'S NOT THE PRICE FOR THE "ANGRY BIRDS." **[6]**

THE COURT: NO, THE PRODUCT IS THE BIRD, ISN'T IT? ISN'T IT THE PROGRAM? YOU'RE NOT JUST PAYING 30 PERCENT. ISN'T THE PROGRAM ITSELF THE PRODUCT THAT IS BEING PURCHASED?

MR. SCHMIDT: YES. THE APPS ARE BEING PURCHASED, BUT APPLE ISN'T BUYING THE APP SO APPLE'S NOT THE PURCHASER. APPLE CANNOT BE A DIRECT PURCHASER IF IT'S NOT BUYING APPS.

THE COURT: ALL RIGHT.

MR. SCHMIDT: ONLY THE CONSUMER BUYS THE APPS. YES, IT BUYS IT THROUGH THE APPLE STORE BUT IF IT WERE PERMITTED TO BUY "ANGRY BIRDS" DIRECTLY FROM THE MANUFACTURER, THEN IT WOULDN'T HAVE TO PAY -- THE CONSUMER WOULDN'T HAVE TO PAY THE 30 PERCENT FEE THAT --

* * *

MR. WALL: THE CONSUMER IS -- IS USING THE APP. STORE APP. STORE -- APPLE'S APP STORE, MUCH LIKE THE -- THE ATM USER IS USING THE CITIBANK MACHINE.

THE COURT: OKAY. SO THIS ISN'T -- IT'S A NOT A BRICKS-AND-MORTAR KIND OF

COROLLARY. IT'S NOT AS IF APPLE'S PURCHASING THEM THEMSELVES AND THEN RESELLING THEM. YOUR ARGUMENT IS IT'S AN INTERMEDIARY BETWEEN WHAT'S BEING PURCHASED.

MR. WALL: THEY'RE COMPLAINING -- WHAT THEIR COMPLAINT SAYS IS THAT BECAUSE APPLE IMPOSES THIS DISTRIBUTION [7] FEE OF 30 PERCENT ON PAID APPS -- AGAIN, FREE APPS DON'T HAVE ANY FEE ASSOCIATED WITH THEM. BUT BECAUSE APPLE PUTS THIS FEE IN PLACE, IT -- LIKE ANY OTHER DISTRIBUTION COST, IT WILL MAKE THE SELLER OF THE PRODUCT CHANGE THEIR PRICE.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE APPLE IPHONE ANTITRUST LITIGATION	)	Case No. 11-06714-YGR
	)	**ORDER GRANTING APPLE'S MOTION TO DISMISS CONSOLIDATED COMPLAINT**

Pending before the Court is Defendant Apple's Motion to Dismiss Plaintiffs' Amended Consolidated Complaint. (Dkt. No. 88.)[1] Plaintiffs allege antitrust claims based on unlawful monopolization and attempted monopolization of an aftermarket for iPhone applications in violation of section 2 of the Sherman Act ("Section 2"). Plaintiffs allege a third claim for conspiracy to monopolize an iPhone voice and data services aftermarket in violation of Section 2 to preserve their ability to challenge the previous dismissal of that claim.

Having carefully considered the papers submitted and the pleadings in this action, the arguments of counsel, and for the reasons set forth below, the Court hereby **GRANTS** Apple's Motion to Dismiss **WITH LEAVE TO AMEND** and **GRANTS** Apple's Motion to Strike.

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[1] Apple's Motion to Dismiss contains a request to strike certain allegations pursuant to Fed. R. Civ. P. 12(f). The Court will refer to the request to strike as the "Motion to Strike."

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *In re Apple & AT&TM Antitrust Litigation*, Case No. 07-05152 ("*Apple I*")

Prior to the instant action, the Honorable James Ware presided over another class action involving defendants Apple and AT&T Mobility, LLC. (*In re Apple & AT&TM Antitrust Litigation*, Case No. 07-05152 ("*Apple I*").) In *Apple I*, plaintiffs alleged five claims for violation of federal antitrust statutes, in addition to violations of consumer protection laws. (*See* Dkt. No. 109 [Revised Consolidated Amended Class Action Complaint ("*Apple I* Complaint")].)[3]

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[2] The following background section is not intended to provide an exhaustive factual or procedural summary of this action or any related actions summarized herein.

[3] The *Apple I* plaintiffs alleged that prior to the launch of the iPhone on or about June 29, 2007, Apple entered into a "secret" five-year contract with AT&TM, under which AT&TM would be the exclusive provider of cell phone voice and data services for iPhone customers through 2012. (*Apple I* Complaint ¶ 2.) Plaintiffs alleged they and class members purchased iPhones and agreed to enter into a two-year voice and/or data service plan with AT&TM, but did not agree to use those services for five years. (*Id.*) In effect, the undisclosed five-year exclusivity agreement locked iPhone users into using AT&TM for five years, contrary to users' contractual expectations. (*Id.*) In addition, plaintiffs alleged that Apple "created a number of software programs called 'applications,' such as ring tone, instant messaging, Internet access, and video and photography enabling software that can be downloaded and used by iPhone owners." (*Id.* ¶ 4.) Apple entered into agreements with software manufacturers by which Apple approved their software applications for iPhone use in exchange for a share of the manufacturer's revenues. (*Id.*) Apple allegedly discouraged iPhone customers from

Plaintiffs alleged that Apple and AT&TM violated Section 2 of the Sherman Act in two ways: first, by "monopolizing, attempting to monopolize or conspiring to monopolize the aftermarket for voice and data services for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices for those aftermarket services." (*Id.* ¶ 10.) Second, Plaintiffs alleged Apple "monopoliz[ed] or attempt[ed] to monopolize the software applications aftermarket for iPhones in a manner that harmed competition and injured consumers by reducing output and increasing prices for those applications." (*Id.* ¶ 11.)

Apple moved to dismiss the Section 2 claims because Plaintiffs had "neither alleged legally cognizable markets under the Sherman Act, nor legally sufficient monopolization of those markets." (Order Denying Defendant AT&TM's Motion to Compel Arbitration and to Dismiss; Denying Defendant AT&TM's Motion to Stay Discovery; Granting in Part and Denying in Part Defendant Apple's Motion to Dismiss [*Apple I*, Dkt. No. 144] at 12.) Judge Ware held that plaintiffs had sufficiently alleged relevant aftermarkets, market power, and monopolization for both the voice and data services and applications aftermarkets to state a claim. (*Id.* at 15–19.) In the same order, Judge Ware also denied AT&TM's motion to compel arbitration. (*Id.* at 6–10.)

Plaintiffs moved for class certification in January 2010. (*See* Dkt. Nos. 240 & 289; Order Granting

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downloading competing third-party application software by refusing to honor warranties if customers downloaded competing applications. (*Id.*)

Defendant Apple's Motion for Summary Judgment; Granting in Part Plaintiffs' Motion for Class Certification; Denying Folkenflik & McGerity's Motion for Appointment as Co-Lead Counsel [Dkt. No. 466] at 2 n.2.) The court certified a class of "[a]ll persons who purchased or acquired an iPhone in the United States and entered into a two-year agreement with Defendant AT&T Mobility, LLC for iPhone voice and data service any time from June 29, 2007, to the present." (*Id.* at 25.)

Following the decision in *AT&T Mobility LLC v. Concepcion*, the Court permitted defendants to file motions to compel arbitration and to decertify the class. (*See* Dkt. Nos. 502, 504, 511 & 514.) On December 1, 2011, Judge Ware issued an Order Granting Motions to Compel Arbitration and Granting Motions to Decertify Class. (Dkt. No. 553.) On December 14, 2011, plaintiffs filed a Motion for Leave to Seek Reconsideration and/or in Addition to Amend the Order to Certify for Immediate Interlocutory Appeal. (Dkt. No. 554.) The Court certified "its December 1 Order for interlocutory appeal solely as to the issue of whether a non-signatory defendant may assert equitable estoppel against a signatory plaintiff." (Dkt. No. 564 at 12.) The Ninth Circuit denied plaintiffs' petition for permission to appeal on April 27, 2012. (Dkt. No. 570.)

B. The Instant Action ("*Apple II*")

1. Procedural Background

Plaintiffs Robert Pepper, Stephen Schwartz, Edward Hayter, and Harry Bass commenced the instant action on December 29, 2011 against Apple Inc. (Dkt. No. 1.) Apple filed a motion to dismiss on

March 2, 2012. (Dkt. No. 14.) Judge Ware consolidated this action with another case, thereby mooting the motion to dismiss and re-naming the action "*In re Apple iPhone Antitrust Litigation*" (hereafter, "*Apple II*"). (Dkt. No. 25.)

A Consolidated Class Action Complaint in *Apple II* was filed on March 21, 2012 ("Prior *Apple II* Complaint"). (Dkt. No. 26.) There, Plaintiffs alleged that Apple entered into a secret five-year contract with *non-party AT&T Mobility, LLC* ("ATTM") that established ATTM as the exclusive provider of cell phone voice and data services for iPhones through 2012. (*Id.* ¶ 2 (effect of undisclosed agreement was to lock iPhone users into ATTM services for five years).) Apple allegedly programmed and installed software locks on iPhones to prevent purchasers from switching to other competing carriers. (*Id.* ¶ 3.) Apple also "enabled the creation of numerous software programs called 'applications'" and released a software development kit in March 2008 that enabled independent software developers to design applications for use on the iPhone. (*Id.* ¶¶ 4–5.) For an annual $99 fee, the kit allowed developers to submit applications to be distributed "through Apple's applications market, the 'iTunes App Store.'" (*Id.* ¶ 5.) Certain applications were made available for free in the App Store, but for any application purchased, Apple allegedly "collect[ed] 30% of the sale of each application, with the developer receiving the remaining 70%." (*Id.*) Plaintiffs allege Apple refused to approve developers who either did not agree to pay the annual fee or agree to the "apportionment scheme." (*Id.*) Apple also "unlawfully discouraged iPhone customers from downloading competing applications software . . . by

telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded Third Party Apps." (*Id.*) Consumers "were not provided a means by which they could download Third Party Apps that were not approved by Apple for sale on the App Store." (*Id.* ¶ 6.)

In the Prior *Apple II* Complaint, Plaintiffs alleged three violations of Section 2 by Apple based on two aftermarkets: (1) unlawful monopolization of the applications aftermarket; (2) attempted monopolization of the applications aftermarket; and (3) conspiracy to monopolize the voice and data services aftermarket. Apple moved to dismiss the then-operative complaint and to compel arbitration of claims. (Dkt. Nos. 37 & 48.) In the motion to dismiss, Apple sought dismissal under Fed. R. Civ. P. 12(b)(7) on the grounds that (i) the complaint failed to name ATTM as a defendant, and (ii) ATTM was a necessary and indispensable party pursuant to Fed. R. Civ. P. 19.

On July 11, 2012, Judge Ware issued an Order Denying Without Prejudice Defendant's Motion to Compel Arbitration; Granting in Part Defendant's Motion to Dismiss. (Dkt. No. 75.) The court held that ATTM was a necessary party and that in order to evaluate the alleged conspiracy to monopolize the iPhone voice and data services aftermarket, it must evaluate whether "ATTM unlawfully achieved market power in that Aftermarket due to the conspiracy and thereby foreclosed other companies from entering the market." (*Id.* at 13 (citing Prior *Apple II* Complaint ¶ 98).) "Such an evaluation of ATTM's conduct would necessarily implicate the interests of ATTM, which means that ATTM is a necessary party pursuant to Rule 19(a)." (Dkt. No.

75 at 13.) The court also held that it was feasible for ATTM to be joined "as this is a proper venue, [it] is subject to the Court's personal jurisdiction, and joinder would not destroy the Court's subject matter jurisdiction." (*Id.* at 15.) As such, the court ordered that ATTM be made a party to the action, but noted that Plaintiffs were *not required* to maintain their claims based on the voice and data services aftermarket. (*Id.* at 16 n.29.) Rather, *if* Plaintiffs sought to maintain the claim, the court explicitly ordered that ATTM be added as a party. (*Id.*)

2. Operative Complaint

Plaintiffs filed an Amended Consolidated Class Action Complaint on September 28, 2012 ("*Apple II* Amended Complaint"). (Dkt. No. 81.) Plaintiffs "decline[d] to add ATTM as a party, [and] thereby recognize[d] that the conspiracy to monopolize claim . . . will remain dismissed." (*Id.* ¶ 8 (stating that the claim "has been retained in this amended complaint solely and exclusively to preserve the right of Plaintiffs . . . to challenge the claim's dismissal on appeal"); *see id.* at p. 20.)[4]

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[4] Zack Ward and Thomas Buchar initiated a third action against Apple, Case No. 12-05404 (hereafter, "*Apple III*") on October 19, 2012. Plaintiffs alleged a violation of Section 2 of the Sherman Act for conspiracy to monopolize the iPhone voice and data services aftermarket. In other words, the sole claim in *Apple III* was the conspiracy claim that Judge Ware previously dismissed in *Apple II*, upon which Plaintiffs elected not to proceed. This Court related *Apple II* and *Apple III*. By stipulation of the parties, this Court dismissed *Apple III* with prejudice for the reasons set forth in Judge Ware's Order in *Apple II* dated July 11, 2012, and entered judgment in favor of Apple. (Dkt. Nos. 23 & 26.) An appeal of the dismissal and

The remaining Section 2 claims in *Apple II* are based on the aftermarket "for software applications that can be downloaded on the iPhone for managing such functions as ringtones, instant messaging, photographic capability and Internet applications (the 'Applications Aftermarket')." (*Apple II* Amended Complaint ¶ 86.) Plaintiffs allege the Applications Aftermarket "came into existence immediately upon the sale of the first iPhones because: (a) [it] is derivative of the iPhone market; and (b) no Plaintiff or member of the Class agreed to any restrictions on their access to the Applications Aftermarket. (*Id.* ¶ 88; *id.* ¶ 9 (Apple "failed to obtain iPhone consumers' contractual consent to Apple prohibiting iPhone owners from downloading Third Party Apps").) Plaintiffs assert their claims on behalf of a class of: "[a]ll persons, exclusive of Apple and its employees, who purchased an iPhone anywhere in the United States at any time, and who then also purchased applications from Apple from December 29, 2007 through the present." (*Id.* ¶ 74.)

Plaintiffs further allege:

> 4. Under its Exclusivity Agreement with ATTM, Apple retained exclusive control over the design, features and operating software for the iPhone. To enhance its iPhone-related revenues, Apple enabled the creation of numerous software programs called "applications," such as ringtones, instant messaging, Internet access, gaming, entertainment, video and photography

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judgment in *Apple III* is currently pending before the Ninth Circuit Court of Appeals.

enabling software that can be downloaded and used by iPhone owners.

5. In March 2008, Apple released a "software development kit" ("SDK") for the stated purpose of enabling independent software developers to design applications for use on the iPhone. For an annual fee of $99, the SDK allows developers to submit applications to be distributed through Apple's applications market, the "iTunes App Store." If the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%. On information and belief, throughout the Class Period, Apple refused to "approve" any application by a developer who did not pay the annual fee or agree to Apple's apportionment scheme. Apple also unlawfully discouraged iPhone customers from downloading competing applications software (hereafter "Third Party Apps") by telling customers that Apple would void and refuse to honor the iPhone warranty of any customer who downloaded Third Party Apps.

6. iPhone consumers were not provided a means by which they could download Third Party Apps that were not approved by Apple for sale on the App Store.

7. Through these actions, Apple has unlawfully stifled competition, reduced output and consumer choice, and *artificially increased prices* in the aftermarket[] for . . . iPhone software applications.

(*Apple II* Amended Complaint ¶¶ 4–7 (emphasis supplied).)

Plaintiffs allege that by monopolizing or attempting to monopolize the software applications aftermarket for iPhones, it has "harmed competition and injured consumers by reducing output and *increasing prices for those applications*." (*Id.* ¶ 11 (emphasis supplied).) Apple has, by design, programmed the iPhone such that iPhone purchasers are "prevented . . . from downloading any Third Party Apps offered by software manufacturers who did not share their revenues with Apple or pay a fee to Apple to sell through iTunes." (*Id.* ¶ 50.) Third Party Apps appeared immediately after the iPhone 2G was launched and "generated competition for Apple in the applications aftermarket." (*Id.* ¶ 67.) Further, Apple faced "competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any portion of that song into a ringtone." (*Id.* ¶ 68.) On the other hand, competing programmers sought to offer a variety of ringtone programs offering free downloads. (*Id.*) Apple initially sought to eliminate Third Party Apps, but "programmers of Third Party Apps quickly circumvented Apple's locking codes." (*Id.* ¶¶ 51 & 69 (Apple sought to update iTunes software to block third-party ringtone programs).) "The availability of Third Party Apps for iPhones reduced Apple's share of the iPhone aftermarket for ringtones and other applications and greatly reduced or threatened to reduce Apple's expected supracompetitive revenues and profits in that aftermarket." (*Id.* ¶ 70.) Put another way, Plaintiffs allege that Apple's anticompetitive actions have

"reduced output and competition and resulted in *increased prices for products sold in the iPhone Applications Aftermarket* and, thus, harms competition generally in that market." (*Id.* ¶¶ 91 & 97 (emphasis supplied).)

II. Pending Motion to Dismiss and Motion to Strike

Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 12(f) are raised in this Motion. Although there is no mandatory "sequencing of jurisdictional issues," jurisdictional questions ordinarily must precede merits determinations in dispositional order. *Sinochem Int'l. Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)). The Court therefore proceeds first with its jurisdictional analysis of the pending Motion under Rule 12(b)(1), and will then proceed with Plaintiffs' failure to add ATTM as a party despite Judge Ware's July 11, 2012 order, the Motion to Strike under Rule 12(f), and finally the Rule 12(b)(6) portion of the Motion to Dismiss.

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. Standard Under Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) tests the subject matter jurisdiction of the Court. *See, e.g., Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039–40 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009 (2004). When subject matter jurisdiction is challenged, the burden of proof is placed on the party asserting that

jurisdiction exists. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir.1986) (holding that "the party seeking to invoke the court's jurisdiction bears the burden of establishing that jurisdiction exists"). Accordingly, the court will presume lack of subject matter jurisdiction until the plaintiff proves otherwise in response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376–78 (1994).

Motions under Rule 12(b)(1) may be either "facial" or "factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial attack, the movant argues that the allegations of a complaint are insufficient to establish federal jurisdiction. *Id.* By contrast, a factual attack or "speaking motion" disputes the allegations that would otherwise invoke federal jurisdiction. *Id.* In resolving a factual attack, district courts may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Id.* (citing *Savage*, 343 F.3d at 1039 n.2). Courts consequently need not presume the truthfulness of a plaintiff's allegations in such instances. *Id.* (citing *White*, 227 F.3d at 1242). Indeed, "[o]nce the moving party has converted a motion to dismiss into a factual motion by presenting affidavits or other evidence properly before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.* (quoting *Savage*, 343 F.3d at 1039 n.2). Further, the existence of disputed material facts will not preclude a trial court from evaluating for itself the merits of jurisdictional claims, except

where the jurisdictional and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co. v. Gen. Tel. Corp.*, 594 F.2d 730, 733–35 (9th Cir. 1979)).

Because Apple argues that Plaintiffs' allegations are insufficient to establish standing, the Court treats the pending Motion as a facial attack on subject matter jurisdiction.

2. Article III Standing

Apple challenges Plaintiffs' Article III standing. A plaintiff has Article III standing when: (1) he or she suffers a "concrete and particularized" injury-in-fact; (2) there is a "causal connection between the injury and the conduct complained of"; and (3) the injury will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Wedges/Ledges of California, Inc. v. City of Phoenix, Arizona*, 24 F.3d 56, 61 (9th Cir. 1994). In class actions, the named plaintiffs must satisfy the requirements of standing. *Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent") (internal quotations and citations omitted). The absence of any one element deprives a plaintiff of Article III standing and requires dismissal. *See Whitmore v. Fed. Election Comm'n*, 68 F.3d 1212, 1215 (9th Cir. 1995).

Apple argues that Plaintiffs' claims must be dismissed because no named Plaintiff alleges he or she ever purchased an App or was overcharged; that any overcharge was the result of allegedly wrongful conduct; nor that named Plaintiffs suffered any injury therefrom. (Mot. at 8.) Apple further argues that Plaintiffs do not allege they were "unaware" of Apple's Apps policies or misled regarding the policies. (*Id.*)

Plaintiffs disagree and specifically emphasize their "collective[]" allegations that they have been deprived lower cost alternatives, paid higher prices for "Apple 'approved' applications," and/or had their iPhones disabled or destroyed. (Opp. at 14; *Apple II* Amended Complaint ¶¶ 92 & 98.) Five of seven named Plaintiffs submit declarations in opposition to the Motion particularizing their allegations of injury. (Opp. at 14.) In sum, these declarations state that named Plaintiffs purchased iPhone applications from the App Store, "would have liked" the ability to download or purchase applications "not available on the App Store," and were not aware at the time of the iPhone purchase that they would be limited to App Store applications nor that "Apple would charge . . . a fee for purchasing applications equivalent to 30% of the purchase price." (*See* Declaration of Michael Liskow in Support of Plaintiffs' Opposition to Defendant Apple's Motion to Dismiss Plaintiffs' Amended Complaint ["Liskow Decl." (Dkt. No. 100)] at Exs. A–E, attaching declarations.) Each declaration concludes with a statement (or substantively similar statement) that "[i]f the 30% fee is proven to be an antitrust violation, or if my inability to obtain apps from sources other than the App Store is proven to be an antitrust violation, I

believe that I have been injured by such violations because I was then overcharged for my apps and prevented from buying apps I wanted to download." (*Id.*; *see also id.*, Ex. D ("I was deprived of certain apps and could have been overcharged").)

The Court finds that Plaintiffs' allegations in the Amended Complaint are insufficient to establish Article III standing. Notably, the Amended Complaint contains allegations that each named Plaintiff purchased an iPhone and "paid for AT&TM *voice and data service* for [his/her] iPhone at AT&TM's stated rates during the Class [P]eriod." (*Apple II* Amended Complaint ¶¶ 3–19 (emphasis supplied); *id.* ¶ 29 ("Each Plaintiff purchased one or more iPhones . . . [and] also purchased wireless *voice and data services* from AT&TM for their iPhones.") (emphasis supplied); *id.* ¶¶ 30–32 (alleging Apple failed to disclose information prior to the purchase of voice and data services).) The Amended Complaint also alleges that four of the seven named Plaintiffs either "wanted to have the option of switching" to another voice and data service provider and/or "would like the ability to unlock his SIM card for international travel." (*Id.* ¶¶ 33–36.) None of these allegations speak to named Plaintiffs' standing with respect to the *applications aftermarket* claims.

Plaintiffs do not satisfy Article III standing with collective allegations that they have been deprived of lower cost alternatives, paid higher prices for Apple-approved applications, *and/or* had their iPhones disabled or destroyed. (*Id.* ¶¶ 92 & 98.)[5] At a

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[5] Moreover, based on Plaintiffs' allegations, named Plaintiffs do not allege facts showing they satisfy the requirements of the class they purport to represent—*i.e.*, "persons . . . who

minimum, Plaintiffs must allege facts showing that each named Plaintiff has *personally suffered* an injury-in-fact based on Apple's alleged conduct. This requires that Plaintiffs at least purchased applications.

While the Plaintiffs' declarations purport to provide information that may satisfy certain deficiencies, the Court considers those declarations only with respect to whether leave to amend should be granted.[6] In this case, the Court finds that leave

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purchased an iPhone ... and who then also purchased applications from Apple from December 29, 2007 through the present." (*Apple II* Amended Complaint ¶ 74.)

6 As noted above, Apple does not dispute the allegations that would otherwise invoke federal jurisdiction and thus raises a facial challenge to Plaintiffs' claims. *See Safe Air for Everyone*, 373 F.3d at 1039. Plaintiffs cite two district court cases for the proposition that they are "permitted to submit declarations buttressing their standing in response to a Rule 12(b)(1) motion." (Opp. at 14 n.5.) Neither case states a categorical rule that declarations may be considered in a *facial attack* under Fed. R. Civ. P. 12(b)(1). In *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1126 (C.D. Cal. 2012), the court considered a Rule 12(b)(1) facial attack on the complaint for lack of subject matter jurisdiction. The court held that plaintiff lacked Article III standing because the complaint did not allege an injury-in-fact, but rather alleged only a desire to engage in a prohibited activity. *Id.* at 1128. The court referenced plaintiff's declaration to emphasize that—like the complaint—the declaration similarly failed to allege an injury-in-fact. *Id.* at 1128 n.4. In *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1184 (N.D. Cal. 2009), the court considered a factual attack on the complaint for lack of subject matter jurisdiction. Notably, a prior order of the court permitted a renewed motion to dismiss "after an appropriate amount of discovery" had been taken to "fully develop" arguments. *Id.* at 1175. Because the "speaking motion" was based on facts in the record, the court considered the factual

to amend is appropriate because additional facts could be alleged to satisfy Plaintiffs' Article III standing requirements. *See Lujan*, 504 U.S. at 560–61 (Article III standing satisfied where plaintiff suffers a "concrete and particularized" injury-in-fact, there is a "causal connection between the injury and the conduct complained of" and the injury will likely be redressed by a favorable decision). However, the Court notes that Plaintiffs' allegations showing injury-in-fact should not be conclusory in nature. (*See* Liskow Decl., Exs. A–E ¶ 8 ("[i]f the 30% fee is proven to be an antitrust violation, . . . I believe that I have been injured by such violations because I was then overcharged for my apps and prevented from buying apps I wanted to download" or "I was deprived of certain apps and could have been overcharged").)

For the foregoing reasons, the Court GRANTS Defendant's Motion based on a lack of Article III standing WITH LEAVE TO AMEND. The Court requests that if Plaintiffs amend their complaint, the document be captioned to reflect that it is a "second amended" complaint.

B. Plaintiffs' Failure to Add ATTM as a Party on the Voice and Data Claim

Apple seeks dismissal of the voice and data aftermarket claim for failure to add ATTM as a party, as required by Judge Ware's July 11, 2012 Order. (Mot. at 5.) Plaintiffs concede in the *Apple II* Amended Complaint that the third claim "remain[s] dismissed" and was retained in the complaint "solely

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evidence presented and overruled defendants' objections to exhibits contained in plaintiff's cross declaration. *Id.* at 1211.

and exclusively to preserve" the right of appeal. (*Apple II* Amended Complaint ¶ 8 & p. 20.) In light of these allegations and the fact that the dismissal of this claim is now on appeal in *Apple III* following a stipulated judgment by the parties, the third claim in this action for Conspiracy to Monopolize the iPhone Voice and Data Services Aftermarket is hereby **DISMISSED WITH PREJUDICE.**

C. Motion to Strike

1. Standard Under Federal Rule of Civil Procedure 12(f)

Fed. R. Civ. P. 12(f) provides that the court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "The function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial[.]" *Whittlestone Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)). Motions to strike are generally disfavored (*Colaprico v. Sun Microsystem, Inc.*, 758 F. Supp. 1335, 1339 (N.D. Cal. 1991)) and are not granted unless it is clear that the matter sought to be stricken could have no possible bearing on the subject matter of the litigation (*LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992)). Consequently, when a court considers a motion to strike, it "must view the pleading in a light most favorable to the pleading party." *In re 2TheMart.com, Inc. Sec Lit.*, 114 F. Supp. 2d 955, 965 (C.D. Cal. 2010). In deciding whether to grant a motion to strike under Rule 12(f), the court must

start with the rule's plain language and determine whether the matter at issue is: (1) an insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous. *Id.* at 973–74.

2. Summary of Arguments

Apple moves to strike "all allegations concerning, and requests for injunction based on, the voice and data claim," which Plaintiffs effectively dismissed by not adding ATTM as a party per Judge Ware's July 11, 2012 Order. Apple contends these allegations are immaterial, impertinent, and improper. (Mot. at 6.)

Plaintiffs argue that Apple has not shown the allegations regarding the voice and data services and that aftermarket are scandalous, impertinent, or immaterial, nor is there any prejudice in the repleading of that claim such that Plaintiffs preserve the claim for appeal. (Opp. at 2.)

3. Analysis

The Court agrees with Apple that Plaintiffs' allegations regarding a dismissed claim are, at a minimum, immaterial and impertinent. Plaintiffs elected not to proceed with their voice and data services aftermarket claim, yet a significant portion of their allegations are still directed to ATTM's voice and data services. (*See, e.g.*, *Apple II* Amended Complaint ¶¶ 2 (undisclosed five-year agreement between Apple and ATTM "locked iPhone users" into five years of service), 3 (Apple installed software locks and prevented purchasers from switching carriers), 9 (consumers did not consent to: using ATTM as data and service provider for five years; having phones locked such that SIM cards of other

providers would not work; not having access to unlock codes), 13–19 (named Plaintiffs each purchased iPhone and paid ATTM for voice and data services), 25–49 & 52–55 (focusing on locking of phones with respect to voice and data services) & 56–66 (focusing on five-year exclusivity agreement with ATTM).) In addition, Plaintiffs continue to allege a conspiracy with third-party ATTM. (*See, e.g.*, *Apple II* Amended Complaint ¶¶ 55, 63 & 66.)

For these reasons, the Court **GRANTS** Apple's Motion to Strike and **ORDERS** that Plaintiffs not include allegations relating to voice and data services or a conspiracy with ATTM if a second amended complaint is filed.

D. Motion to Dismiss for Failure to State a Claim

1. Standard Under Federal Rule of Civil Procedure 12(b)(6)

Pursuant to Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief may be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must

be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusions couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead "enough facts to state a claim [for] relief that is plausible on its face." *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, "for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

2. Request for Judicial Notice

In ruling on a Rule 12(b)(6) motion, generally, a court "may not consider any material beyond the pleadings." *United States v. Corinthian Colleges*, 655 F.3d 984, 998–999 (9th Cir. 2011) (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). A court may, however, "consider unattached evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the

document." *Corinthian Colleges*, 655 F.3d at 999 (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) and *Lee*, 250 F.3d at 688). In addition, Fed. R. Evid. 201 allows a court to take judicial notice of "matters of public record," but not facts that may be subject to a reasonable dispute. *Lee*, 250 F.3d at 689–90; Fed. R. Evid. 201(b)(2) (judicial notice may be taken of facts not subject to a reasonable dispute because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Taking judicial notice of "matters of public record" under Fed. R. Evid. 201 and consideration of documents "necessarily relie[d]" upon in the complaint are two separate exceptions to the general rule that a court may not consider material beyond the pleadings on a Rule 12(b)(6) motion. *Lee*, 250 F.3d at 689–90.

As part of its Motion, Apple seeks judicial notice of two press releases referenced in, but not attached to, the operative complaint. (Defendant Apple's Request for Judicial Notice in Support of Its Motion to Dismiss Plaintiffs' Amended Consolidated Complaint ("RJN" [Dkt. No. 89]), Exs. 1 & 2; *see Apple II* Amended Complaint ¶¶ 5 & 76.) These press releases—entitled "Apple Announces iPhone 2.0 Software Beta" (dated March 6, 2008) and "Apple's App Store Downloads Top 25 Billion" (dated March 5, 2012)—are available online. Apple contends judicial notice is proper because the documents are necessarily relied on in the complaint and Plaintiffs purport to summarize the contents of the press releases therein. (RJN at 1–3.)

Plaintiffs did not file an opposition or objection to the request for judicial notice, nor did they object at the hearing to the RJN itself or defense counsel's

statements based on the contents of the exhibits at issue.

While Plaintiffs have not disputed the authenticity of the exhibits, the Court finds it is not appropriate to take judicial notice in this instance. The fact of the issuance of press releases may be undisputed, but the contents therein may nonetheless be subject to a reasonable dispute. For these reasons, the Court **DENIES** Apple's Request for Judicial Notice.

3. Antitrust Standing

a. *Illinois Brick* Doctrine

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court held that "only direct purchasers have standing under section 4 of the Clayton Act[7] to seek damages for antitrust violations." *Delaware Valley*, 523 F.3d at 1120–21 (citing *Illinois Brick*, 431 U.S. at 735). Under *Illinois Brick*, "only the first party in the chain of distribution to purchase a price-fixed product has standing to sue." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 864 (N.D. Cal. 2012) ("*In re CRT*"); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 748 (9th Cir. 2012) ("[A] direct

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[7] Section 4 of the Clayton Act, 15 U.S.C. section 15(a) ("Section 4"), provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." "The Supreme Court has interpreted th[is] section narrowly, thereby constraining the class of parties that have statutory standing to recover damages through antitrust suits." *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1120 (9th Cir. 2008).

purchaser has 'been injured in its business as required by [§] 4' even though it passes on 'claimed illegal overcharge[s] to' its customers.") (first alteration supplied) (quoting *Illinois Brick*, 431 U.S. at 724). Indirect purchasers are precluded from suing "based on unlawful overcharges passed on to them by intermediaries in the distribution chain who purchased directly from the alleged antitrust violator." *In re CRT*, 911 F. Supp. 2d at 864 (citations omitted). While *Illinois Brick* prevented offensive use of a "pass-through" theory by indirect purchasers, it also prohibited defendants from using a pass-on theory to challenge the standing of direct purchasers. *In re CRT*, 911 F. Supp. 2d at 864; *In re ATM Fee*, 686 F.3d at 748.

Standing does not depend solely on a purchaser's status as direct or indirect. Instead, standing of indirect purchasers depends upon whether any of the recognized exceptions to the *Illinois Brick* rule apply. *In re CRT*, 911 F. Supp. 2d at 865. In *In re ATM Fee*, the Ninth Circuit explained there are three exceptions to the rule that indirect purchasers do not have standing: (1) "when a preexisting cost-plus contract with the direct purchaser exists"; (2) where an indirect purchaser "establishes a price-fixing conspiracy between the manufacturer and the middleman" and the conspiracy "fix[es] the price paid by the plaintiffs"—known as the "co-conspirator exception"; and (3) "when customers of the direct purchaser own or control the direct purchaser" or "when a conspiring seller owns or controls the direct

purchaser." *In re ATM Fee*, 686 F.3d at 749 (citations omitted).[8]

b. Summary of Arguments Regarding Antitrust Standing

Apple argues that Plaintiffs' Amended Complaint impermissibly seeks damages for injuries sustained by Plaintiffs as indirect purchasers, in violation of *Illinois Brick*. Plaintiffs are "indirect victims of Apple's policies" because *the developers* are alleged to pay Apple a $99 annual developer fee and 30% of each paid application. (Mot. at 9.) Plaintiffs do not allege that their injury includes payment of the $99 annual fee. Rather, their injury consists of "(a) be[ing] deprived of lower cost alternatives for applications; (b) be[ing] forced to pay higher prices for Apple 'approved' applications; and/or (c) ha[ving] their iPhones disabled or destroyed." (*Apple II* Amended Complaint ¶¶ 92 & 98.)

Apple relies heavily on *In re ATM Fee*, where ATM cardholders challenged certain fees associated with use of ATMs not owned by their card-issuing bank, or a "foreign" ATM. (Mot. at 9–10.) *In re ATM Fee*, 686 F.3d at 744–45. While cardholders paid certain fees for using a foreign ATM, at least one other fee was paid by the card-issuing bank to the ATM owner (an "interchange fee"). *Id.* at 745. Plaintiffs alleged that defendants engaged in horizontal price fixing by colluding to fix this

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[8] The Ninth Circuit also recognized a potential fourth exception that "indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue." *In re ATM Fee*, 686 F.3d at 749 (noting, however, a lack of clarity regarding whether the exception exists).

"interchange fee," which was then passed on to plaintiffs as part of the foreign ATM fee paid by cardholders to the card-issuing bank. *Id.* at 746. The district court held that the allegedly unlawful (interchange) fee was not directly paid by cardholder-plaintiffs, and thus they were indirect purchasers. *Id.* at 750. The Ninth Circuit affirmed that plaintiff-cardholders were indirect purchasers and thus lacked standing under *Illinois Brick*. *Id.* at 750.

Notably, the Ninth Circuit also agreed with the district court that the co-conspirator exception to *Illinois Brick* did not provide a basis for standing. That exception allows an indirect purchaser to sue when the direct purchaser conspires horizontally or vertically to fix the price paid by plaintiffs. *Id.* In contrast, the ATM cardholders alleged that defendants fixed the interchange fee that was paid between members of the ATM network and *then* passed along the artificially inflated fee to plaintiffs. *Id.* at 750–51.[9] In the Ninth Circuit, however, "the price paid by a plaintiff must be *set by the conspiracy* and not merely affected by the setting of another price." *Id.* at 754 (emphasis supplied). Because it was not the case that defendants conspired to fix the

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[9] The Ninth Circuit rejected plaintiffs' argument that "conspiring to set a price for the purpose and effect of raising the price at issue equates to fixing that price and makes the payers of the raised price direct purchasers." *In re ATM Fee*, 686 F.3d at 753; *id.* at 755 (declining to extend co-conspirator exception beyond when the conspiracy involves setting the price paid by the plaintiffs).

actual price plaintiffs paid, the exception did not apply.[10]

Apple argues that here there are no allegations that an actual price was fixed. All the allegedly wrongful conduct is ancillary as it restricts developers only: the developer sets the price of the Apps in accordance with Apple's policies, the developer agrees to pay Apple 30% of the price of any downloaded Apps, and the developer pays the $99 developer fee. (Mot. at 10.) Thus, as was the case in

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[10] Apple also relies on *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1169 (8th Cir. 1998) for the proposition that indirect victims of exclusionary conduct are indirect purchasers who "bear[] some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser." In *Campos*, plaintiffs were music fans who sued Ticketmaster for, among other things, engaging in price fixing with concert venues and promoters and monopolizing (and attempting to monopolize) the market for ticket distribution servicers. *Id.* at 1168. The district court dismissed the action, holding that plaintiffs lacked standing under *Illinois Brick*, which the Eighth Circuit affirmed. *Id.* at 1171–72. There, plaintiffs argued they were direct purchasers of "ticket distribution services" because they paid directly to Ticketmaster service *and* convenience fees. *Id.* at 1171 (Eighth Circuit noted that "like the Third Circuit, [it] d[id] not find billing practices to be determinative of indirect purchaser status."). The appellate court noted that Ticketmaster had exclusive contracts with concert promoters that required venues to use Ticketmaster for ticket distribution to those events; thus, plaintiffs' alleged inability to obtain ticket delivery services in a competitive market was the consequence of the "antecedent inability of venues to do so." *Id.* ("[T]icket buyers only buy Ticketmaster's services because concert venues have been required to buy those services first."). This "derivative dealing" was the "essence of indirect purchaser status" which, accordingly, constituted a bar to the antitrust claims for damages. *Id.*

Campos, the alleged unlawful increase in price is caused by the antecedent transaction between Apple and the developers. (*Id.* at 11.) The consumer's involvement is therefore derivative of the antecedent transaction and, consequently, they are indirect purchasers without antitrust standing.

Plaintiffs disagree. Plaintiffs contend under *In re ATM Fee*, direct purchaser status is determined by "whether the plaintiff paid the alleged unlawful fee directly to the alleged wrongdoer." (Opp. at 12 (emphasis omitted).) Here, Plaintiffs allege they were "forced to buy third party developers' applications *directly from Apple's App Store*, and that iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps." (Opp. at 11 (citing *Apple II* Amended Complaint ¶¶ 4–5) (emphasis added in Opposition).) As such, "they are direct purchasers and have standing to sue under Ninth Circuit jurisprudence." (*Id.* at 12 (citing *In re ATM Fee*, 686 F.3d at 754).)[11]

Plaintiffs emphasize that Apple ignores an entire category of apps alleged in the *Apple II* Amended Complaint. Specifically, Plaintiffs are direct purchasers because they brought both (i) Apple-made Apps directly from Apple, and (ii) third-party developer Apps directly from Apple's App Store. (Opp. at 11; *see Apple II* Amended Complaint ¶¶ 67–

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[11] Plaintiffs acknowledge in their Opposition that they do not challenge the $99 annual fee paid by developers to Apple. (Opp. at 12–13 (conceding Plaintiffs did not pay that fee themselves).) "Plaintiffs challenge *only the 30% fee* that they paid directly to Apple." (Opp. at 13 (emphasis supplied).)

70.)[12] An example of such Apple-made apps were "songs converted into ringtones, for which 'Apple charged the customer an additional 99 cents." (Opp. at 11; *Apple II* Amended Complaint ¶ 68 ("Apple also faced competition for iPhone ringtones. When a customer purchased a song for $1 from the Apple iTunes store, Apple charged the customer an additional 99 cents to convert any portion of that song into a ringtone.") "In both cases [of Apple-made apps and third party apps], consumers paid the supracompetitive price *directly to the monopolist* – Apple – which kept the entirety of the overcharges for itself." (Opp. at 11–12.)[13] In addition, Plaintiffs note that Apple attempts to convolute the allegations to make it appear as though the app developers are the direct purchasers. (Opp. at 12.) This is not the case: Apple cannot be a direct purchaser because it does not buy the apps, but iPhone consumers buy the apps directly from Apple because they are not otherwise available to purchase on an iPhone.

In its Reply, Apple contends Plaintiffs' argument that iPhone consumers were forced to pay Apple a 30% fee *on top of* the cost of the app is not reflected

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[12] The Court notes that throughout the Opposition, Plaintiffs appear to cite to paragraph numbers from a prior complaint, and not the operative Amended Complaint.

[13] Plaintiffs argue that the Eighth Circuit's holding in *Campos v. Ticketmaster*—that plaintiffs were indirect purchasers even though they dealt directly with the alleged monopolist—is inconsistent with Ninth Circuit precedent. (Opp. at 13.) In fact, Judge Ware in *Apple I* noted in his order granting in part plaintiffs' motion for class certification that "the Court is not aware of any Ninth Circuit case that applied *Illinois Brick* in this manner." (*Apple I*, Dkt. No. 466 at 19 n.27.)

in the operative complaint, which only states that for each paid app made available in the app store, "Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (*Apple II* Amended Complaint ¶ 5; Reply at 8.) In other words, Apple does not charge consumers a 30% fee on top of the cost of the app, but Apple charges the developers a 30% fee for the apps they choose to offer for a cost in the App Store. (Reply at 8.) Apple argues this is identical to *In re ATM Fee* because this 30/70% "apportionment scheme" leads developers to pass on the 30% fee to consumers by charging higher prices for their Apps, similar to how the "interchange fee" in *In re ATM Fee* was allegedly passed on to cardholders as a "foreign ATM fee" that they directly paid. (*Id.* at 9.)

c. Analysis

An analysis under *Illinois Brick* centers on whether the alleged unlawful fee was paid directly or through a pass-through. The burden is on Plaintiffs to allege the theory and facts upon which they are proceeding. The allegations in the Amended Complaint contradict the arguments made in opposition to Apple's Motion. The *Apple II* Amended Complaint does not allege a "supracompetitive" or "fixed" price, but rather a mark-up. Plaintiffs allege throughout the Amended Complaint that Apple's conduct has "unlawfully stifled competition, reduced output and consumer choice, and artificially increased prices in the aftermarkets for . . . iPhone software applications." (*Apple II* Amended Complaint ¶ 7; *id.* ¶¶ 11 ("increased price for those applications"), 91 & 97.) Nowhere do Plaintiffs explain how Apple's conduct results in increased

"prices" or how said prices were paid. In their Opposition, Plaintiffs confirm that they challenge "only the 30% fee" (Opp. at 13) but also, for the first time, argue that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps" (Opp. at 11 (emphasis in original)).[14] Because the Court's analysis focuses on the actual allegations of the Amended Complaint, and those allegations do not sufficiently identify the basis upon which Plaintiffs are proceeding, the Court declines to issue an advisory opinion analyzing *Illinois Brick* as relevant here.

Accordingly, the Court GRANTS leave to amend the complaint to address antitrust standing and *Illinois Brick*.

4. Other Arguments Regarding Failure to State a Claim

In light of the Court's dismissal based on a lack of Article III standing, the Court declines to address additional arguments raised by Apple. To the extent that Plaintiffs file a second amended complaint, Apple *may not raise* for the first time on a future motion to dismiss any argument that was *previously available but not raised* in this Motion.

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[14] On this point, Plaintiffs cite to the complaint at paragraphs 4–5. The Court notes, however, that the only reference to a 30% fee in this paragraph range does not provide that the fee is paid "on top of" the cost of the application. Rather, it states: "Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (*Apple II* Amended Complaint ¶ 5.)

III. Effect Of Prior Orders

A. Effect of Federal Rule of Civil Procedure 12(g) on Pending Motion to Dismiss

Plaintiffs argue that Apple's Motion is improper under Fed. R. Civ. P. 12(g)(2), which provides that "[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Rule 12(h)(2) states that failure to state a claim upon which relief can be granted, to join a person under Rule 19(b), or to state a legal defense to a claim may be raised: (A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c); or (C) at trial. Rule 12(h)(3) provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."[15]

Plaintiffs contend that Apple is barred from asserting lack of standing and failure to state a claim because it failed to raise these arguments on either of the two prior motions to dismiss. (Opp. at 7–9 (arguing that claims based on applications

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[15] The Advisory Committee Notes to Fed. R. Civ. P. 12 explain the policy behind the prohibition against successive motions: "This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case." In addition, "[a] party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions."

aftermarket are the "exact same" as the Prior *Apple II* Complaint and Apple was "fully capable" of raising its arguments earlier).)[16]

Apple responds that it is not barred by Rule 12(g) because the defense of failure to state a claim and challenges to subject matter jurisdiction are never waived, and may be asserted at any time before trial. (Reply at 3–4.)

Apple is correct that its defenses of failure to state a claim and lack of subject matter jurisdiction were not waived if not included in its first Rule 12 motion. Such defenses may be raised by a Rule 12(c) motion or at trial. However, Apple is incorrect to the extent that it implies it may repeatedly make Rule 12(b) motions to assert such defenses. (*See* Reply at 4.) While specific defenses may not have been waived, Apple does not enjoy an unbridled ability to file successive motions to dismiss. Successive motions under Rule 12(b) are generally not permissible and create significant inefficiencies within the court system.

District courts in the Ninth Circuit have noted, however, that Rule 12(g) applies to situations where

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[16] Apple's first motion to dismiss in *Apple II* sought dismissal for failure to join an indispensable party. Judge Ware denied the motion as moot when he ordered that Plaintiffs file a consolidated complaint. Apple's second motion to dismiss re-raised the failure to join an indispensable party under Rule 12(b)(7), and sought dismissal of the voice and data services aftermarket claim under Rule 12(b)(6) for failure to state a claim for conspiracy or to allege a cognizable aftermarket. Judge Ware granted the motion for failure to join ATTM as a necessary party under Rule 12(b)(7) and denied the Rule 12(b)(6) motion as premature without prejudice to renew on a different ground after joining ATTM.

successive motions are filed for "sole purpose of delay." *Kilopass Tech. Inc. v. Sidense Corp.*, No. C 10-02066 SI, 2010 WL 5141843, at *3 (N.D. Cal. Dec. 13, 2010) (citing *Abarca v. Franklin County Water Dist.*, No. 1:07–CV–0388, 2009 WL 1393508, at *2 (E.D. Cal. May 18, 2009)); *see Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1175 (C.D. Cal. 2011) ("Rule 12(g) is designed to avoid repetitive motion practice, delay, and ambush tactics."); *see Davidson v. Countrywide Home Loans, Inc.*, No. 09-CV-2694-IEG JMA, 2011 WL 1157569, at *4 (S.D. Cal. Mar. 29, 2011) (successive motions not brought for purpose of wasting time under Rule 12 where defendants responded to multiple amended complaints). Even if a party files successive motions, a court has discretion to consider the arguments to expedite final disposition on particular issues. *Davidson*, 2011 WL 1157569, at *4; *Allstate Ins.*, 824 F. Supp. 2d at 1175 (noting substantial authority provides that "successive Rule 12(b)(6) motions may be considered where they have not been filed for the purpose of delay, where entertaining the motion would expedite the case, and where the motion would narrow the issues involved").

The Court rejects Plaintiffs' argument that Rule 12(g) bars the consideration of subject matter jurisdiction in the pending Motion. Because the Court is obligated to dismiss an action in the absence of subject matter jurisdiction—whether by its own motion or by motion of a party—consideration of this issue promotes efficiency and expedites disposition of the action on the merits. In addition, the Court notes that because Apple would be permitted to file a Rule 12(c) motion on the grounds raised in this Motion, efficiency is served by addressing the issues

sooner. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) (motion for judgment on pleadings to raise defense of failure to state claim may be made even after filing answer).

B. Collateral Estoppel

Plaintiffs argue Apple is barred by the doctrine of non-mutual offensive collateral estoppel from raising "the very same arguments it fully and fairly litigated but lost in a prior action." (Opp. at 9.) Collateral estoppel "bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir.1992). A party asserting collateral estoppel must show: (i) "that the estopped issue is identical to an issue litigated in a previous action"; and (ii) that "the issue to be foreclosed in the second litigation must have been litigated and decided in the first case." *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995), *opinion amended on reh'g sub nom. Kamilche v. United States*, 75 F.3d 1391 (9th Cir. 1996) (citations omitted).

Plaintiffs argue that because Apple fully raised and lost "each of the central arguments" on this Motion before Judge Ware, it is precluded "from raising any form or variation of them again[,] not just the precise arguments Apple made." (Opp. at 9–10.)[17] Moreover, Plaintiffs contend that Judge

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[17] Specifically, Judge Ware held in *Apple I* that plaintiffs had sufficiently alleged relevant aftermarkets, market power, and monopolization for both the voice and data services and applications aftermarkets to state a claim. (Dkt. No. 144 at 15–19.)

Ware's Order disposing of Apple's arguments was sufficiently "final" for collateral estoppel purposes because it was firm enough to be accorded preclusive effect. (*Id.* at 10–11 (denials of pre-trial motions are "often sufficiently 'final' for collateral estoppel").) Plaintiffs acknowledge that it is within the court's discretion to apply the doctrine of collateral estoppel. (Opp. at 9.)

Apple responds that it is not barred by collateral estoppel because the claims in *Apple II* are not "identical" to *Apple I*. (Reply at 5–6.) Apple identifies the allegations regarding the 30/70% "apportionment scheme" as being a "core" allegation in this action that was not alleged in *Apple I*. (*Id.* (further arguing that the primary allegations have evolved from consumers being unable to download third-party applications to a dispute over the terms of permitting downloads).) In addition, Apple disputes that any ruling by Judge Ware constituted a final judgment with regard to the pending apps claims. (Reply at 7 (ruling was part of an interlocutory order).) Finally, Apple argues that the ruling regarding the apps claims was not essential to any judgment because Judge Ware ultimately ordered the action to arbitration. While "an appeal may be taken from Judge Ware's arbitration order, and/or from the arbitrator's decision if appropriate," no appeal can be taken from Judge Ware's interim order on whether Plaintiffs stated their apps claims. (*Id.* at 7–8.)

The Court agrees with Apple that collateral estoppel does not bar its arguments here. The allegations in the two actions are similar and significantly overlap, but not identical. Further, the Court does not agree with Plaintiffs that Judge

Ware's order on a motion to dismiss is sufficiently final, where the rulings could not have been appealed while the action was pending in this district *and* Judge Ware ultimately ordered the action to arbitration. The Court hereby rejects Plaintiffs' argument that collateral estoppel bars Apple's arguments on this Motion.

IV. CONCLUSION

For the foregoing reasons, Apple's Motion to Dismiss Plaintiffs' Amended Consolidated Complaint is **GRANTED WITH LEAVE TO AMEND** as set forth herein. Plaintiffs' second amended complaint shall be filed within twenty-one (21) days of the date of this Order. A Case Management Conference is scheduled for November 4, 2013 at 2:00 p.m. This Order terminates Dkt. No. 88.

IT IS SO ORDERED.

Dated: August 15, 2013

/s/ Yvonne Gonzalez Rogers

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR RELATED CASE NO. C 07-05152-JW **DEFENDANT APPLE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** Date: November 5, 2013 Time: 2:00 P.M. Place: Courtroom 5, 2nd Floor The Honorable Yvonne Gonzalez Rogers

* * *

IV. PROCEDURAL HISTORY AND STATEMENT OF FACTS

* * *

B. The Factual Allegations In The Second Amended Complaint

* * *

Plaintiffs' SAC makes almost no meaningful changes to the allegations relevant to the *Illinois Brick* issues. Plaintiffs' First Amended Complaint challenged what it called "Apple's apportionment scheme" whereby "[i]f the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (First Amended Complaint, Dkt. 81 ¶ 5.) Apple's *Illinois Brick* arguments targeted that (close to accurate) description of Apple's policies, in response to which Plaintiffs told the Court that they could allege that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps." (Opp. to Mot. to Dismiss, Dkt. 99 ("Opp.") at 11, italics in original, underscoring added.) The SAC, however, does not allege that consumers pay Apple a 30% fee "on top of the cost for the apps." Plaintiffs do repeatedly allege that consumers pay a fee, which they call "Apple's fee," but they never allege that such a fee is added by Apple "on top of the cost for the apps." Instead, just as in the First Amended Complaint, Plaintiffs acknowledge that "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." (SAC ¶ 41; *see also id.* ¶ 40 (referring to a 30% commission).)

Plaintiffs could never honestly allege that Apple adds a fee—any fee—to the price set by developers for their Apps. The truth of Plaintiffs' original allegation, repeated in SAC ¶ 41, that Apple takes a commission off of *the developer's price*, is evident

every time a consumer buys an App from the App Store.

* * *

V. ARGUMENT

A. The SAC Confirms That Plaintiffs Are Indirect Purchasers And Lack Antitrust Standing Under *Illinois Brick*

* * *

The clear intent of the Order was to give Plaintiffs an opportunity to demonstrate that they were not making a claim based on "mark-up" or pass-through dynamics, but instead based on something Apple did directly to the consumer, *e.g.*, an Apple "fee on top of the cost of the app." The former theory is a non-starter, since the core holding of *Illinois Brick* is that due to the "nearly insuperable difficulty" of trying to determine how much of an upstream price increase may have been passed on downstream, a plaintiff whose claim is based on a "pass-on theory" does not suffer injury within the meaning of Section 4 of the Clayton Act. *Illinois Brick Co.*, 431 U.S. at 725 n.3, 726. The latter theory is deficient as well, as seen in *Campos*. 140 F.3d at 1169-71 (*Illinois Brick* barred claim even though Ticketmaster added fees made possible through upstream monopolization). But the Court understandably did not want to deal with that arguably closer issue if it was not presented.

The Second Amended Complaint does its best to avoid doing what the Order directed, while attempting to give the impression of compliance.

Instead of alleging evidentiary facts about how Apple's App Store works or explaining the pricing mechanics, the SAC tries to talk around the issue by using labels and conclusions that skirt the key point. The most pertinent allegations imply that (a) there is a 30% fee, (b) that fee is Apple's, (c) Apple collects it, and (d) consumers pay it for every App they buy. (*See* SAC ¶¶ 4, 6, 7, 8, 14, 41.) But the allegations studiously avoid a simple declarative sentence that Apple takes a price that has been established by the developer and adds 30% (or anything) to that. The Court was crystal clear that there is an important difference between claiming that the fee Apple charges developers is included in the price of an App and claiming that Apple charges its own fee on top of the developer-set price. (Dkt. 108 at 19 n.14.) In fact, that is the entire point of footnote 14 in the Court's Order. Yet Plaintiffs, knowing perfectly well that it would be frivolous to claim that Apple engages in the latter practice, dance around the issue with statements like Apple "charg[es] consumers an extra 30% for every app" (*see, e.g.*, SAC ¶ 8) that sound responsive to the Court's Order but are just a repackaging of Plaintiffs' argument that the developer's price is burdened by Apple's "commission."

These intentionally vague and conclusory allegations are particularly insufficient given the Court's express direction to Plaintiffs to *explain how the 30% fee is paid by consumers*: as a pass-through from developers, or as an entirely separate charge Apple adds "on top of" the developers' App price when the consumer makes a purchase. (Dkt. 108 at 19-20.) The Court asked for clarity on a simple binary distinction about who *first* bears Apple's fee.

If it is the App developer, then Plaintiffs do not have standing to pursue their claim against Apple—even if the fee is "anticompetitive" and passed-through to the consumer.

* * *

It is enough for this motion to be granted that Plaintiffs failed to include the allegation about added fees that they told the Court they could plead. Yet Plaintiffs also cannot bury their earlier allegations *admitting there is no added fee*. Plaintiffs' First Amended Complaint got the relevant facts basically right, alleging that "[i]f the application is not made available for free in the App Store, Apple collects 30% of the sale of each application, with the developer receiving the remaining 70%." (First Amended Complaint, Dkt. 81 ¶ 5.) That does not now disappear.

* * *

Finally, *this* Complaint still admits the key facts. It states, "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer." (SAC ¶ 41.) It also states, "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of the third party's sales proceeds*." (*Id.* ¶ 32, emphasis added.) These allegations make clear that Apple's allegedly wrongful conduct acts in the first instance *on developers*, effectively imposing a distribution cost on them. Most everything else Plaintiffs allege, if true, would likewise only *restrict developers* (*i.e.*, the restriction on developers' ability to use alternative means of distribution). The effects

on consumers are by definition indirect effects. The developer, not Apple, sets the "price" for the App and the developer's ultimate proceeds are net of Apple's commission. It is the antecedent transaction between Apple and the developer that causes the allegedly unlawful increase in the price of Apps. As a result, Plaintiffs do not have antitrust standing.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE iPHONE ANTITRUST LITIGATION	Lead Case No. C 11-06714-YGR
	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT APPLE'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED CONSOLIDATED COMPLAINT
	DATE: November 5, 2013
	TIME: 2:00 P.M.
	CRTRM: 5, 2nd Floor
	JUDGE: Hon. Yvonne Gonzalez Rogers

* * *

I. INTRODUCTION

* * *

Apple continues to argue that Plaintiffs are indirect purchasers who lack antitrust standing by speciously "cherry-picking" from Plaintiffs'

allegations to make them fit Apple's tired and contrived theory that, under *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998) (a case Judge Ware held is inapplicable to these iPhone actions), Apple's 30% fee is "passed-on" to Plaintiffs by apps developers rather than imposed by Apple and paid directly by Plaintiffs to Apple. Apple invites the Court to ignore the vast bulk of Plaintiffs' allegations, which show indisputably that Apple ***itself*** sells every app ***directly*** to iPhone consumers, Apple ***itself*** imposes and ***directly*** collects from iPhone consumers every 30% fee it charges, and Apple's 30% fee is a supracompetitive price that exceeds the prices consumers otherwise would pay for apps had Apple not unlawfully monopolized the iPhone apps aftermarket.

* * *

Apple has undeniably succeeded in eliminating retail price competition for iPhone apps. Even the apps developers themselves are forbidden by Apple from selling their own products directly to iPhone consumers. Absent Apple's unlawful exclusion of all competition from the apps aftermarket, iPhone consumers could buy apps from the developers and numerous software retailers without having to pay Apple's 30% fee, and many more apps would be available to consumers in a competitive market than are available today.

* * *

II. THE CURATIVE FACTS ALLEGED IN THE SECOND AMENDED COMPLAINT

* * *

Plaintiffs' SAC satisfies each of the Court's concerns. ***First***, the SAC alleges that Apple's 30% fee that Plaintiffs paid was "on top of" what Plaintiffs would otherwise pay for the apps:

- "Consequently, ***the prices for apps*** available in Apple's App Store ***include the developers' price plus Apple's 30%*** mark-up." ¶ 41 (emphasis added).
- Apple charges "***an extra 30%*** for every app." ¶ 8 (emphasis added).

* * *

IV. LEGAL ARGUMENT

A. Plaintiffs are Direct Purchasers with Antitrust Standing

1. Apple's Argument Ignores the Relevant Pleaded Facts

* * *

Apple's whole argument rests on the ***entirely false*** premise that the SAC "does not allege that consumers pay a 30% fee 'on top of the cost for the apps.'" Apple Mem. at 6, 7. Apple simply ignores Plaintiffs' unequivocal allegation that "the prices for apps available in Apple's App Store ***include the developers' price plus Apple's 30% mark-up***." ¶ 41 (emphasis added). The allegation that iPhone apps buyers pay the developers' price ***plus*** Apple's 30% fee is merely a technical, less colloquial way of saying that iPhone consumers pay Apple's 30% fee "on top of the cost for the apps." Plainly, the two expressions mean precisely the same thing. Thus, contrary to Apple's argument, Plaintiffs have indeed

alleged in "a simple declarative sentence" that Apple's fee is in addition to the developers' price for the apps. *See* Apple Mem. at 7. Apple's indirect purchaser argument, which simply brushes aside this allegation, should fail for this reason alone.

Plaintiffs' allegation that iPhone apps buyers pay the apps developers' price "***plus***" Apple's 30% fee is not even the sole allegation that makes this point. Plaintiffs also make many corroborative allegations, which Apple similarly ignores: Plaintiffs allege that Apple charges "an ***extra*** 30% for every app," ¶ 8 (emphasis added); that ***Apple*** charges the 30% fee, not the apps developers, ¶ 40; that iPhone consumers would "pay less" for apps if they were not unlawfully locked into buying apps only from Apple and paying Apple's 30% fee, ¶ 14; that apps developers have been barred by Apple "from selling apps at prices below Apple's ***inflated 30% marked-up price***," ¶ 50 (emphasis added); that "Apple's 30% fee constitutes virtually pure profit for Apple," ¶ 48; that in "a competitive apps distribution environment," developers would be able to sell their own apps directly to consumers "without charging Apple's 30% mark-up" and software retailers could sell apps "for far less than a 30% profit," ¶ 48; and that the absence of competition has caused iPhone consumers to pay "hundreds of millions of dollars ***more*** for iPhone apps than they would have paid in a competitive market," ¶ 4 (emphasis added).

Taken collectively, these allegations plainly state that in a competitive market, apps developers could have sold their own apps to Plaintiffs without adding on the 30% fee that Apple forced Plaintiffs to pay in its monopolized apps aftermarket. Absent Apple's unlawful monopoly, consumers would have paid only

the apps developers' lower prices. Plaintiffs, therefore, unambiguously allege that Apple's fee was "on top of" the developers' costs, thus unquestionably demonstrating antitrust injury.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE APPLE IPHONE ANTITRUST LITIGATION	CASE NO. C 11-06714-YGR RELATED CASE NO. C 07-05152-JW **DEFENDANT APPLE'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT** Date: November 5, 2013 Time: 10:00 AM Place: Courtroom 5, 2nd Floor The Honorable Yvonne Gonzalez Rogers

* * *

I. INTRODUCTION

* * *

Plaintiffs' Opposition now acknowledges that their Second Amended Complaint ("SAC" or "Complaint") does not use those words, but claims they use another "expression" that "mean[s] precisely the same thing." (Dkt. 116 ("Opp.") at 7.) That is not true. The particular allegation that

Plaintiffs point to (SAC ¶ 41) illustrates the game Plaintiffs are playing. It states that "the prices for apps available in Apple's App Store include the developers' price plus Apple's 30% mark-up." It does not state—despite the Court's express request for clarity on this point—that Apple's so-called "mark-up" was *added to* the developer's price. There is nothing about this phrasing nor the SAC's other allegations ("an extra 30% for every app," "Apple's 30% fee," and so on) that is different from the allegations in the complaint the Court deemed insufficient. There is no mystery why Plaintiffs won't simply state "Apple adds 30% to the developer's price": they know it is not true. Under the Ninth Circuit's *In re ATM Fee* decision, Plaintiffs are indirect purchasers without antitrust standing and the SAC should be dismissed with prejudice.

* * *

II. THE OPPOSITION CONFIRMS THAT PLAINTIFFS ARE INDIRECT PURCHASERS WHO LACK ANTITRUST STANDING UNDER *ILLINOIS BRICK*

* * *

B. Plaintiffs Have Failed To Allege That They Are Direct Purchasers, And Their Contrary Claims In Opposition Once Again Fail To Comport With The Actual Allegations Of Their Complaint

* * *

Plaintiffs First Amended Complaint alleged—correctly—that "Apple collects 30% of the sale of

each application, with the developer receiving the remaining 70%." (Dkt. 81 ¶ 5.) Faced with the *Illinois Brick* wall, Plaintiffs backtracked, trying to create the impression without actually saying that Apple itself added a separate fee on top of the developer's price. But the Court recognized that "[t]he allegations in the Amended Complaint *contradict* the arguments [Plaintiffs] made in opposition to Apple's Motion." (Dkt. 108 at 19, emphasis added.) These earlier allegations do not disappear now that Plaintiffs have filed the SAC.

Second, Plaintiffs' assertions that they have pled the requisite facts requested by the Court—and that Apple has "cherry-picked" allegations—are meritless. The changes Plaintiffs made in the SAC with respect to *Illinois Brick* avoid the key issue. We are here now because months ago, Plaintiffs told the Court that their earlier complaint alleged that "iPhone consumers were forced *to pay Apple* a 30% fee on top of the cost for the apps." (Dkt. 99 at 11, emphasis in original.) The Court correctly found Plaintiffs' claim to be false, but gave Plaintiffs leave to amend to actually include that allegation. (Dkt. 108 at 19-20.) *They have not done so*—because they can't, at least not truthfully. Their claim that the SAC says essentially the same thing, albeit in a "technical, less colloquial way" (Opp. at 7), is wrong.

Plaintiffs claim that the following allegation means "precisely the same thing" as the missing allegation:

> the prices for apps available in Apple's App Store include the developers' price plus Apple's 30% mark-up

(Opp. at 7; SAC ¶ 41.) Not so. It begs the key question, which is how Apple's supposed "markup" is included in the cost of the App. If it is "included" through pass-through dynamics, Plaintiffs do not have standing.

* * *

. . . As noted in Apple's motion, the SAC itself contains more allegations that reveal the truth. The SAC admits that "Apple takes its 30% commission off the top and then remits the balance, or 70% of the purchase price, to the developer," (¶ 41) and further alleges that "Apple always conditioned its 'approval' of such apps on the third party's agreement to give Apple *a share of the third party's sales proceeds*." (*Id.* ¶ 32, emphasis added.) These allegations show that Apple's allegedly wrongful conduct acts *on developers*, and that any effects on consumers are by definition indirect effects barred by *Illinois Brick*.

Were more needed to show that Plaintiffs have not sufficiently pled their claims, Plaintiffs include the following description of the SAC's allegations in their Opposition brief:

> "Taken collectively, these allegations plainly state that in a competitive market, **apps developers could have sold their own apps to Plaintiffs without adding on the 30% fee** that Apple forced plaintiffs to pay in its monopolized aftermarket." (Opp. at 8, emphasis added.)
>
> "[I]n 'a competitive apps distribution environment,' developers would be able to sell their own apps directly to consumers

> **'without charging Apple's 30% mark-up'. . . ."** (*Id.*, citing SAC ¶ 48, emphasis added.)

This, of course, is exactly the point: it is the App developers that decide whether to include some, none, or all of Apple's 30% commission in the price they set for their Apps. Whether or not Plaintiffs are correct in believing that App developers would not include Apple's 30% commission in the price they set for Apps if there were distribution outlets other than the App Store, any consumer "harm" results from those App developer decisions. What is crystal clear, from Plaintiffs' own allegations, is that Plaintiffs are *consumers* of Apps complaining about restrictions on App *developers* that allegedly indirectly affect the prices set by those developers. Plaintiffs' claims are thus barred by *Illinois Brick* and should be dismissed with prejudice.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

IN RE APPLE IPHONE ANTITRUST LITIGATION	)	PAGES 1 – 18
	)	No. C 11-06714 YGR
	)	OAKLAND, CALIFORNIA
	)	TUESDAY, NOVEMBER 5, 2013

TRANSCRIPT OF PROCEEDINGS

* * *

[2]

* * *

THE COURT: GOOD MORNING.

MR. SCHMIDT, IN THE LAST ORDER WITH RESPECT TO THE MOTION TO DISMISS THAT WAS BROUGHT, I INDICATED SOME VERY SPECIFIC INFORMATION THAT I THOUGHT WAS NECESSARY TO ALLEGE. IN ANTITRUST CASES, IT IS THE COURT'S DUTY, I THINK TO -- TO BE VIGOROUS AND MAKE SURE THAT WE DO NOT ALLOW ANTITRUST CASES TO GO FORWARD UNLESS IT MEETS VERY -- THE STANDARD.

AND A NUMBER OF THOSE QUESTIONS STILL WEREN'T ANSWER, AND PERHAPS IT'S

BECAUSE YOU DON'T WANT TO ANSWER THEM. BUT IT APPEARS TO ME THAT THE COMPLAINT IS TRYING TO SKIRT AROUND THE ATM CASE, AND THAT GIVES ME CONCERN.

* * *

[5]

* * *

YOU -- YOU DEVOTE A FOOTNOTE TO SAYING YOU CAN'T TELL ME THAT YOU HAVE A FEE THAT APPLE ADDS BY SAYING THAT APPLE TAKES A COMMISSION. THOSE ARE DIFFERENT THINGS. AND -- AND THEY CAN'T SAY THAT BECAUSE THEY CAN'T ALLEGED ALLEGE IT IN GOOD FAITH. THAT'S --

LET'S BE CLEAR. THIS IS NOT SOMETHING THAT'S SECRET. APPLE SELLS -- HAS SOLD BILLIONS OF APPS TO MILLION OF CONSUMERS. IT NEVER ADDS A FEE. COUNSEL KNOWS THAT, SO HE'S NOT GOING TO SAY THAT WHEN ANGRY BIRDS IS PRICED AT 99 CENTS, APPLE ADDS 30 CENTS TO IT. HE'LL NEVER SAY THAT 'CAUSE HE CAN'T.

THE COURT: ALL RIGHT. STOP.

CAN YOU SAY THAT?

MR. SCHMIDT: YES. WE'RE SAYING IT BECAUSE THE DEVELOPER IS GOING TO -- IS GOING TO CHARGE WHAT ITS COST IS PLUS A MARGINAL REASONABLE RATE OF RETURN. IF THE DEVELOPER WERE ALLOWED TO SELL ANGRY BIRDS ON ITS OWN WEBSITE, WHICH IT CAN'T DO BECAUSE APPLE HAS

MONOPOLIZED THE WORLDWIDE DISTRIBUTION MARKET OF SOFTWARE FOR THE IPHONE, THE DEVELOPER WOULD CHARGE ITS COST PLUS REASONABLE RATE OF RETURN. IT WOULD CHARGE 66 CENTS. BUT BECAUSE APPLE NEEDS TO MAKE 30 PERCENT, THAT'S ITS MONOPOLY PROFIT.

* * *

MR. SCHMIDT: IT -- IT -- THE DEVELOPER INSTEAD [6] PRICES THE PRODUCT AT APPLE'S INSTRUCTION AT 99 CENTS. BUT APPLE DOESN'T PAY THE 30 CENTS. THE DEVELOPER DOESN'T PAY THE 30 CENTS. THE ONLY PERSON WHO PAYS THE 30 CENTS IS THE PERSON WHO BUYS THE IPHONE. THAT'S A DIRECT PURCHASER SITUATION.

IT -- WHETHER APPLE ITSELF CHARGES THE 30 CENTS OR IT TELLS THE DEVELOPER TO CHARGE THE 30 CENTS, IT DOESN'T MAKE A DIFFERENCE, BECAUSE THEN WHAT YOU'RE DOING IS YOU'RE EITHER A DIRECT PURCHASER OR YOU HAVE A COCONSPIRATOR SITUATION.

* * *

THE COURT: THERE IS NOTHING -- THERE IS NO -- WHERE IS THE ALLEGATION THAT SAYS THAT -- THAT APPLE REQUIRES THEM TO SELL IT AT A PARTICULAR PRICE? WHAT STOPS THE DEVELOPER FROM -- THE DEVELOPER CAN SELL IT FOR 69 CENTS, CAN'T THEY? THERE'S NO --

MR. SCHMIDT: YEAH, BUT --

* * *

[7]

THE COURT: LET ME FINISH.

MR. SCHMIDT: I'M SORRY.

THE COURT: THERE'S NO ALLEGATION IN HERE THAT SAYS THAT THEY CAN'T SELL IT FOR 69 CENTS.

MR. SCHMIDT: THERE -- THERE IS AN ALLEGATION IF YOU READ THE INFERENCES --

THE COURT: WHAT --

MR. SCHMIDT: -- FROM THE --

THE COURT: -- PARAGRAPH?

MR. SCHMIDT: THE ALLEGATION IS THAT THE DEVELOPERS --

THE COURT: WHAT PARAGRAPH?

MR. SCHMIDT: THERE'S A SERIES OF PARAGRAPHS, YOUR HONOR.

THE COURT: AND THEN YOU SAID, THERE WAS AN INFERENCE. WHY IS THERE AN INFERENCE? WHY CAN'T YOU JUST SAY IT?

MR. SCHMIDT: BECAUSE -- BECAUSE WE BELIEVE WE HAVE SAID IT, YOUR HONOR.

THE COURT: ALL RIGHT. SO WHERE? WHAT PARAGRAPH?

MR. SCHMIDT: OKAY. ON PAGE 5 OF THE BRIEF, WE SUMMARIZE ALL THE PARAGRAPHS --

THE COURT: I'M ASKING YOU TO TELL ME --

* * *

MR. SCHMIDT: OKAY. PARAGRAPH -- PARAGRAPH 41, [8] PARAGRAPH 8, PARAGRAPHS 3 TO 4, PARAGRAPHS 14, 46, 47, 48 --

* * *

MR. WALL: I THINK IT WAS PRETTY CLEAR THAT YOUR HONOR WANTED US TO DISTINGUISH BETWEEN -- WANTED PLAINTIFFS TO DISTINGUISH BETWEEN TWO DIFFERENT SCENARIOS. ONE -- SCENARIO ONE IS THAT THE DEVELOPER SETS A PRICE KNOWING THAT THIS 30 PERCENT COMMISSION IS GOING TO BE CHARGED IF IT'S A PAID APP -- REMEMBER, THIS ONLY APPLIES TO PAID APPS 'CAUSE FREE APPS COME WITH FREE DISTRIBUTION.

BUT IN THAT -- IN THAT SITUATION, WE'RE DEALING WITH THE PROBLEM THAT THE SUPREME COURT RAISED IN THE ILLINOIS BRICK DECISION AND IN ALL THE SUBSEQUENT DECISIONS, WHICH IS WE DON'T KNOW WHAT THAT PRICE WOULD HAVE BEEN BECAUSE THE DEVELOPER, WHO IS THE PERSON WHO IS PAYING FOR DISTRIBUTION SERVICES -- COUNSEL'S

SAYING THAT THE CONSUMER IS THE FIRST [9] PURCHASER.

NO, APPLE'S CHARGING FOR DISTRIBUTION. THAT'S WHAT THIS FEE DOES. IF YOU -- IF YOU HAVE TO DISTRIBUTE THROUGH THE APP STORE, THEN YOU'LL HAVE TO PAY A 30 PERCENT COMMISSION. SO THE WHOLE PROBLEM WITH THAT SCENARIO IS WE HAVE TO WONDER WHAT THE DEVELOPER WOULD HAVE CHARGED. AND THE SUPREME COURT SAYS BLACK-AND-WHITE RULE, WE WON'T GO DOWN THAT PATH.

NO MATTER HOW MUCH THAT COUNSEL THINKS THAT HE CAN SOLVE IT OR SAY THAT HOW PEOPLE WOULD HAVE BEHAVED, THE SUPREME COURT FLATLY PROHIBITS THAT INQUIRY.

THE ALTERNATIVE SCENARIO IS WHERE THE DEVELOPER HAS SET ITS PRICE. THE DEVELOPER HAS -- HAS EXERCISED IN ITS DISCRETION, SET A PRICE, AND THEN APPLE JUST GOES AND TACKS ON SOMETHING TO IT. IN THAT CASE, THE PRICE TO THE CONSUMER IS ELEVATED FROM WHAT THE DEVELOPER -- FROM THE PRICE THAT THE DEVELOPER SET.

THAT'S WHY THE TWO DIFFERENT SCENARIOS, THE PRICES ARE -- TO THE CONSUMER ARE DIFFERENT. WELL, THIS CASE IS CLEARLY THE FIRST SCENARIO, AND THAT'S THE POINT OF -- OF THE SECOND SLIDE, AND IT QUOTES THE LANGUAGE FROM THE -- FROM THE FIRST PARAGRAPH THAT

COUNSEL CITED TO YOU, WHICH IS PARAGRAPH 41.

AND WHAT PARAGRAPH 41 IS SAYING, IN THE SECOND SENTENCE, IS THAT APPLE TAKES ITS 30 PERCENT COMMISSION OFF THE TOP, THEN REMITS THE BALANCE OR 70 PERCENT OF THE PURCHASE PRICE TO THE DEVELOPER.

* * *

[12]

* * *

MR. SCHMIDT: . . . AND IF APPLE TELLS THE DEVELOPER, WHO THINKS IT NEEDS 99 CENTS TO TURN A REASONABLE PROFIT, THAT WE'RE GOING TO CHARGE 30 PERCENT OF YOUR PRICE, WE'RE GOING TO TAKE THIS 30 PERCENT COMMISSION, THEN THE DEVELOPER KNOWS THAT'S GOING TO BE GETTING 66 CENTS INSTEAD OF 99 CENTS TO -- TO MAKE A PROFIT, [13] AND THE DEVELOPER IS NOT GOING TO LOSE MONEY. SO WHAT'S THE DEVELOPER GOING TO DO? THE DEVELOPER IS GOING TO INCREASE ITS PRICE TO COVER APPLE'S -- APPLE DEMANDED PROFIT.

MR. WALL: AND --

MR. SCHMIDT: BUT -- BUT -- SO -- BECAUSE IT KNOWS THAT EVERY OTHER APP DEVELOPER IS DOING THE SAME THING. SO WHETHER APPLE CHARGES THE 30 PERCENT DIRECTLY -- IF APPLE BOUGHT THE APPS FROM THE DEVELOPER, AND THEN

INCREASED THE PRICE BY 30 PERCENT BECAUSE IT HAD A MONOPOLY AND THEN SOLD THE PRODUCT TO THE CONSUMER, THAT WOULD CLEARLY BE A DIRECT PURCHASER SITUATION.

THIS IS EXACTLY THE SAME THING. APPLE THINKS THEY CAN GET OUT FROM UNDER THIS BY TELLING THE APP DEVELOPER TO CHARGE ITS SUPER-COMPETITIVE PRICE FOR IT.

THE COURT: WHERE IS THE ALLEGATION THAT THEY DID THAT?

MR. SCHMIDT: IT'S --

THE COURT: IT IS --

(SIMULTANEOUS COLLOQUY.)

THE COURT: IT IS WHAT YOU WANT ME TO INFER. THERE IS NO ALLEGATION.